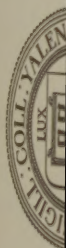


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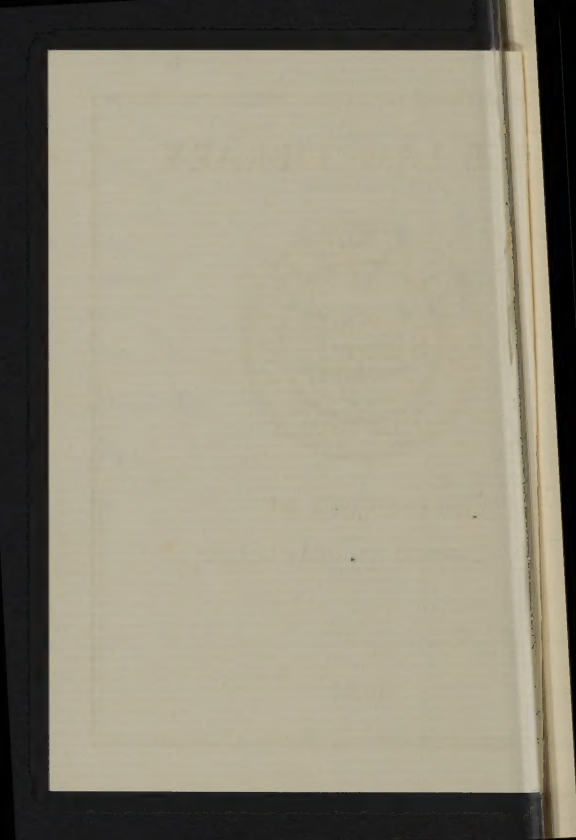
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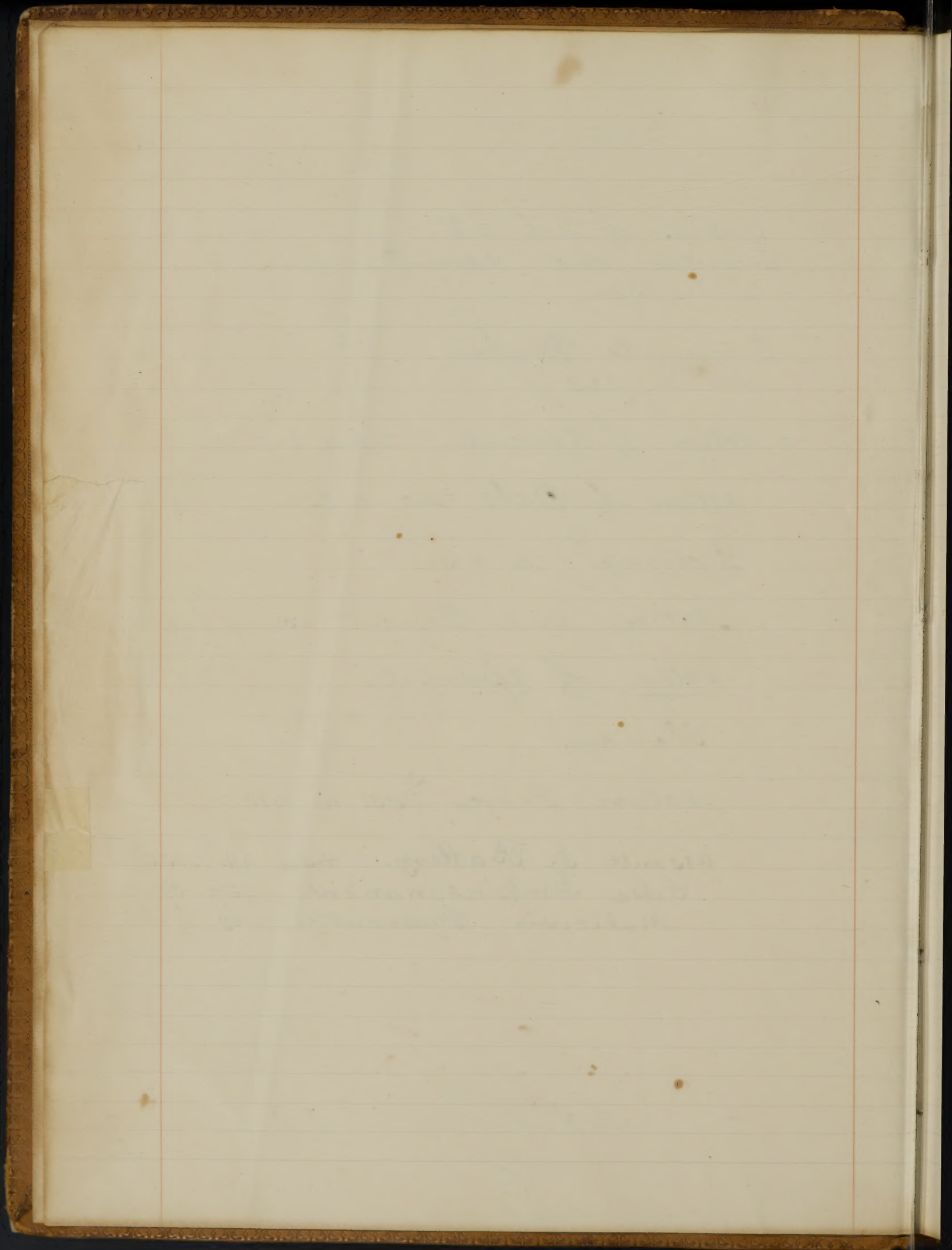
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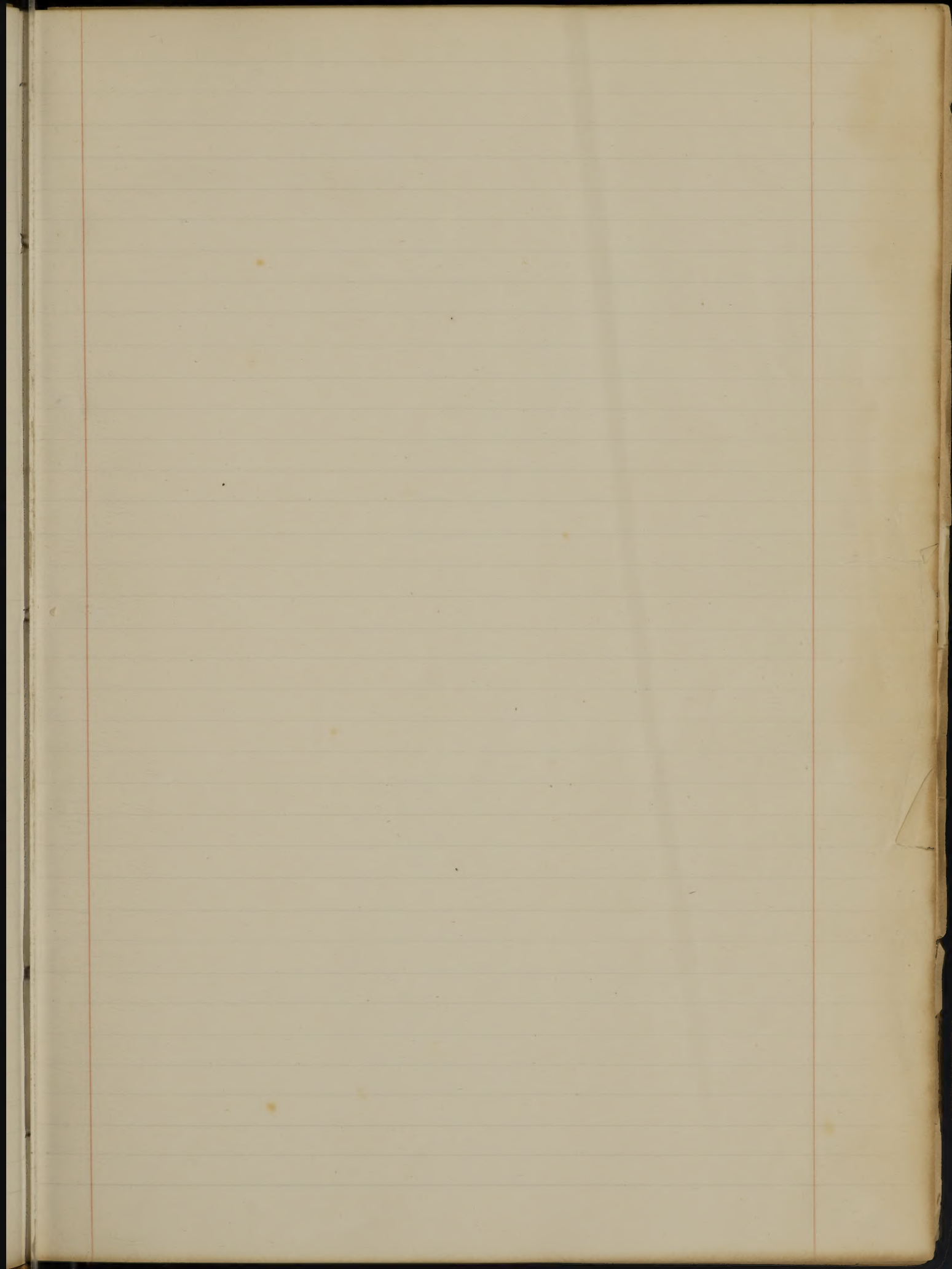
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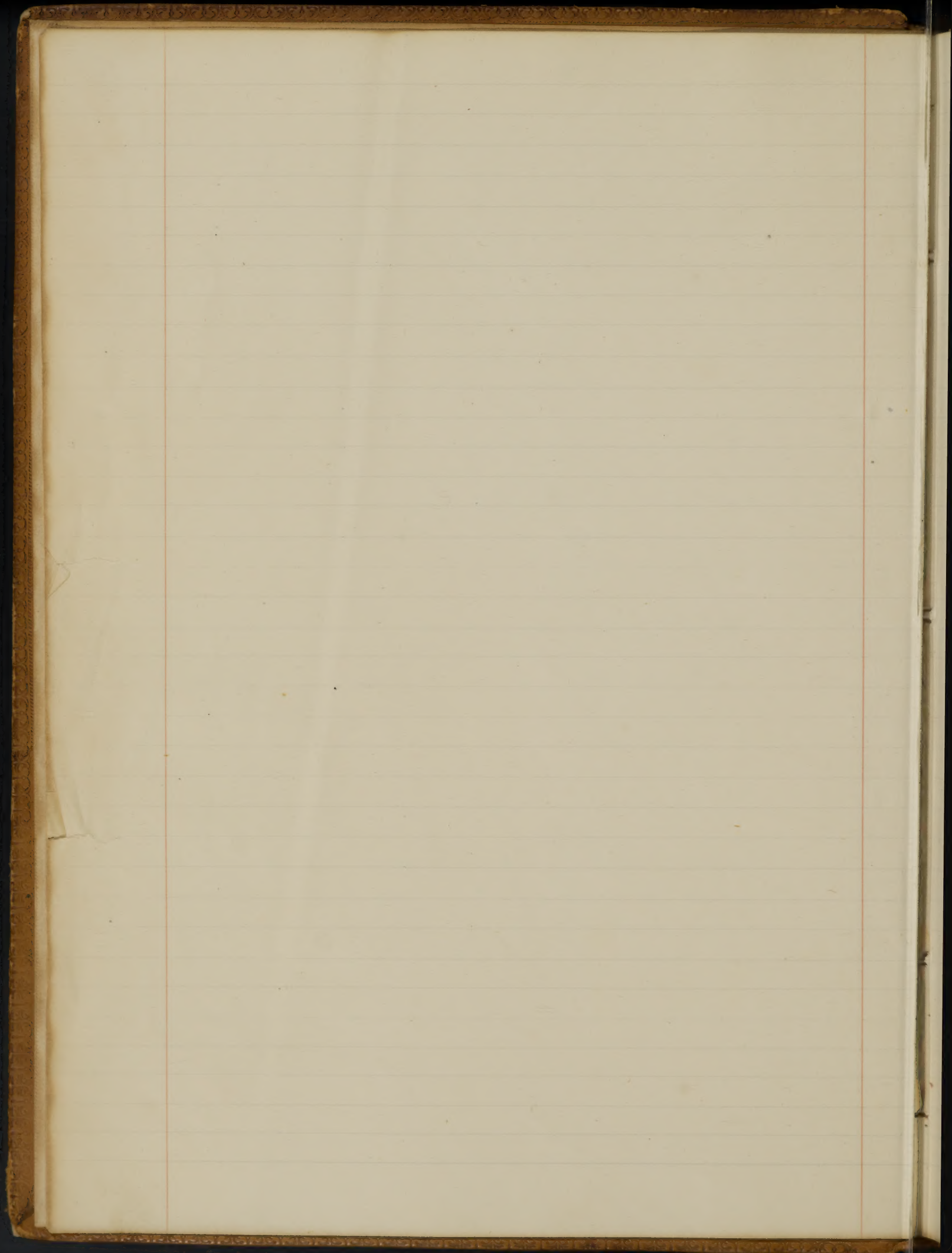
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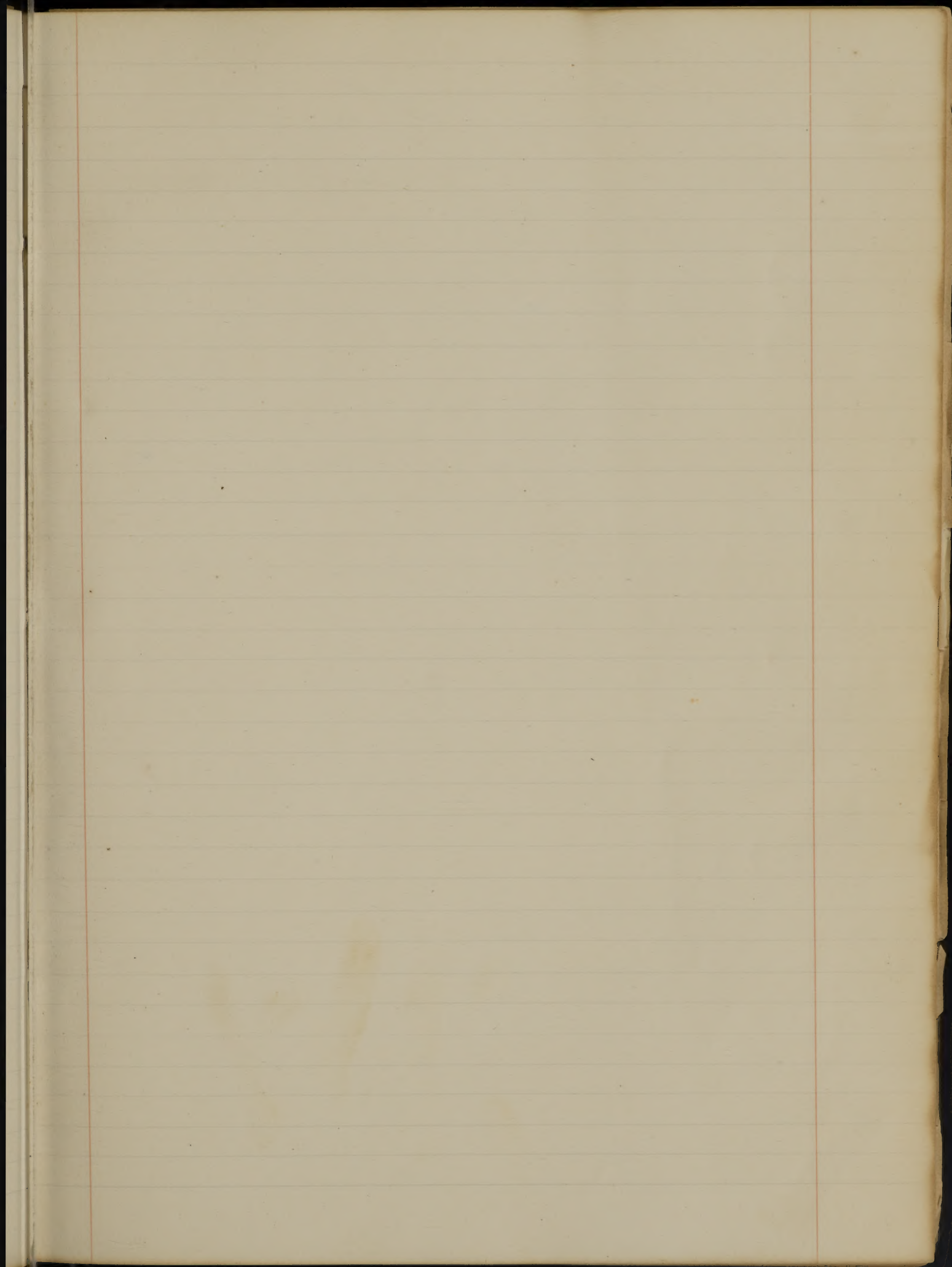
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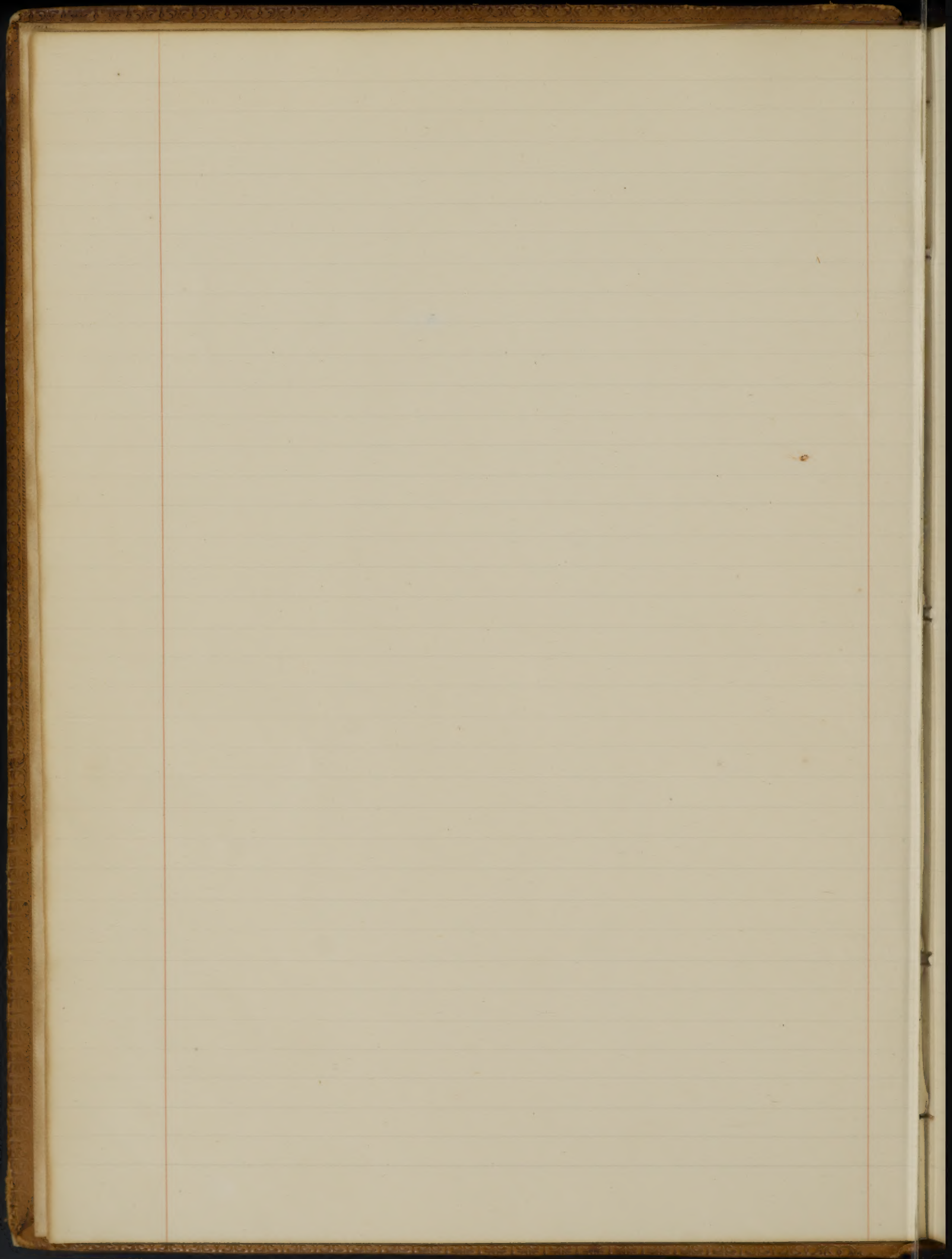
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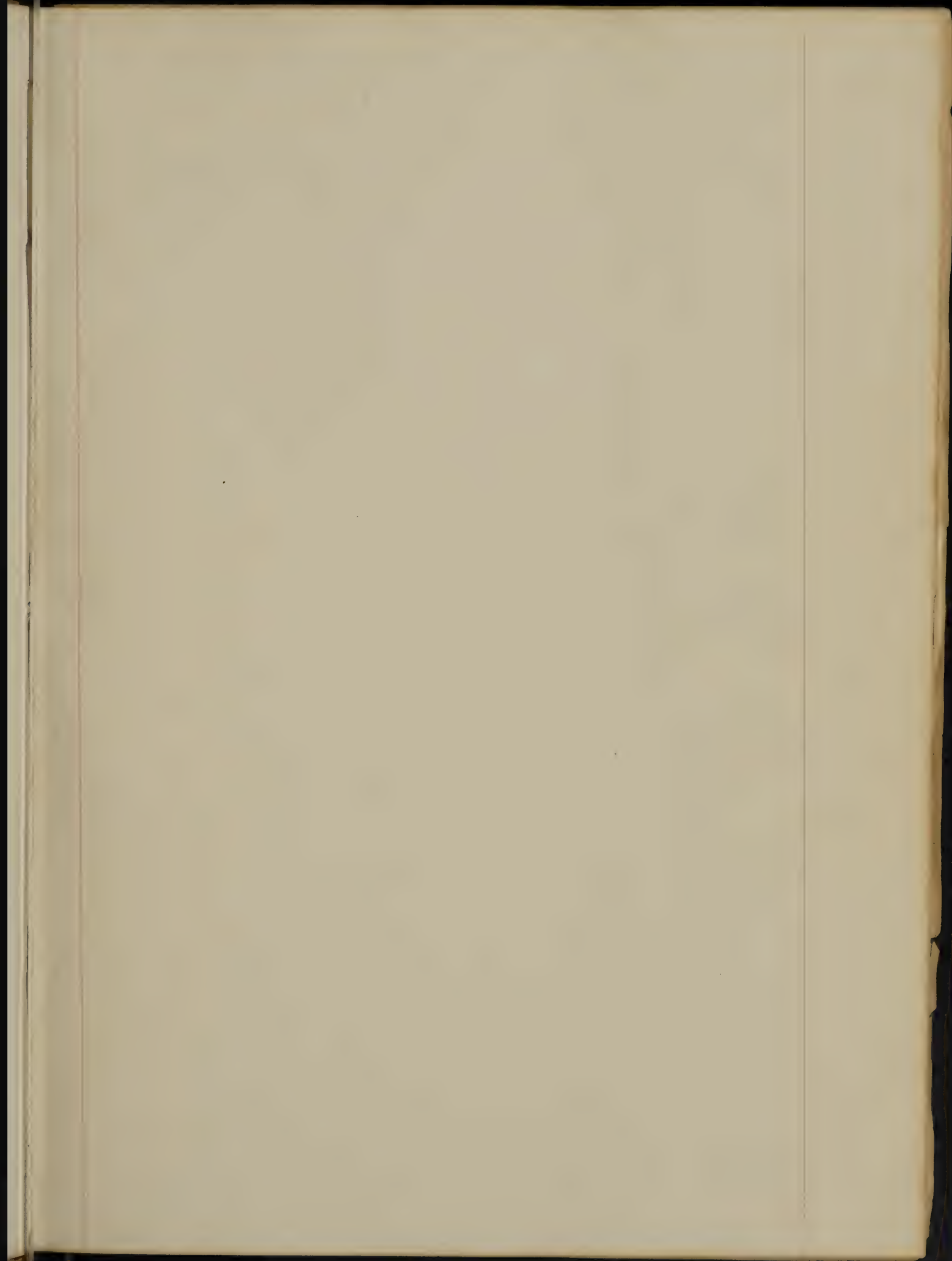


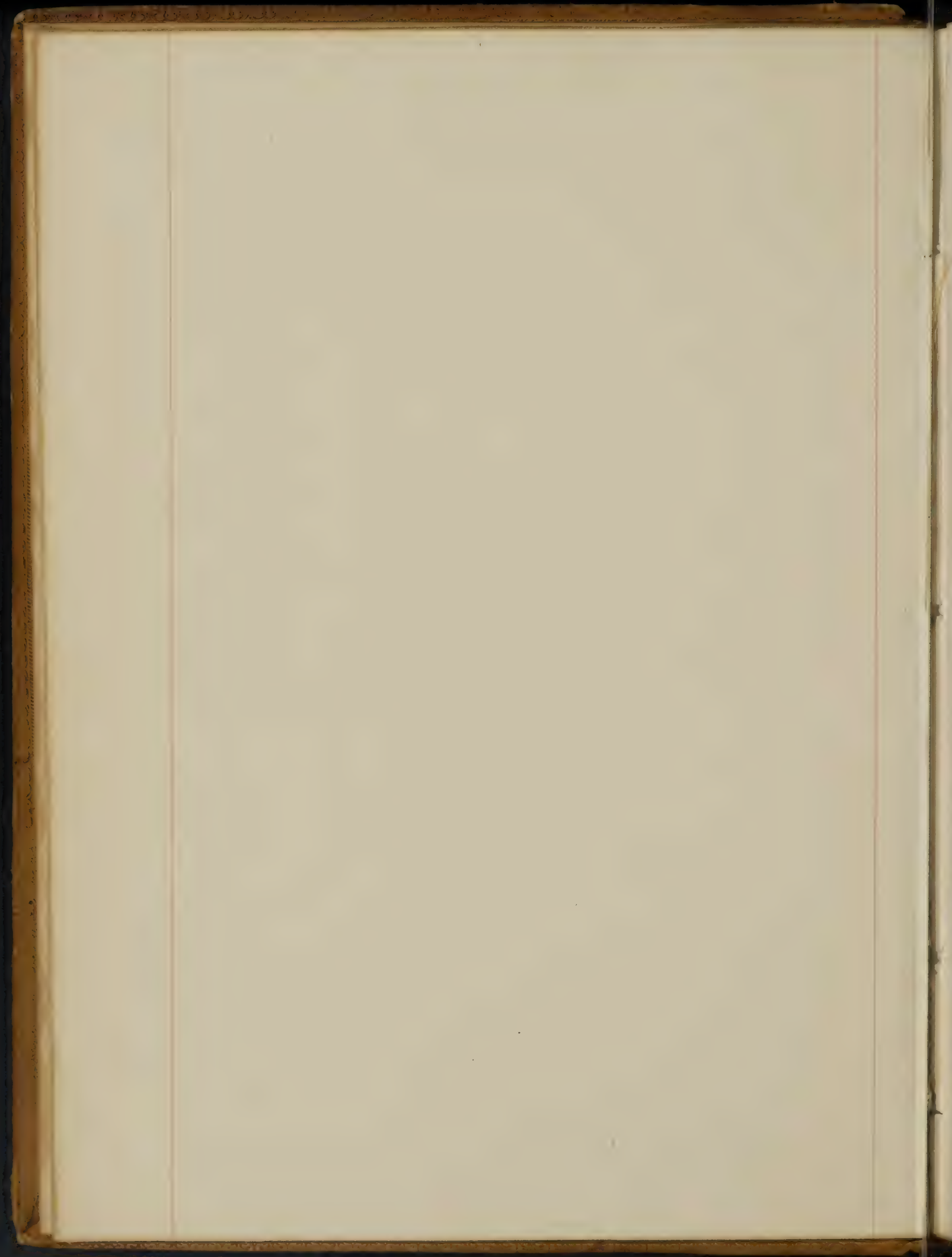


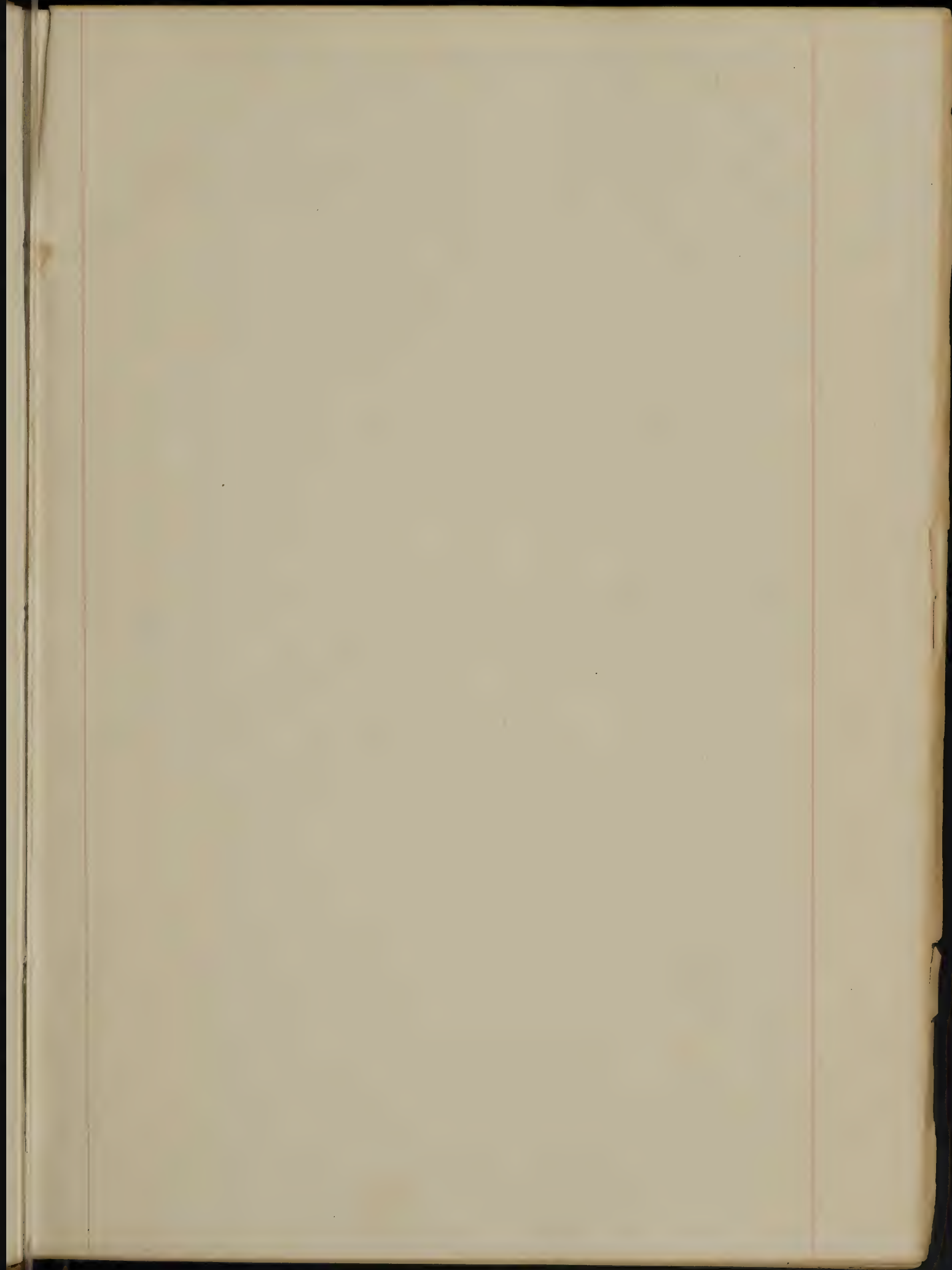


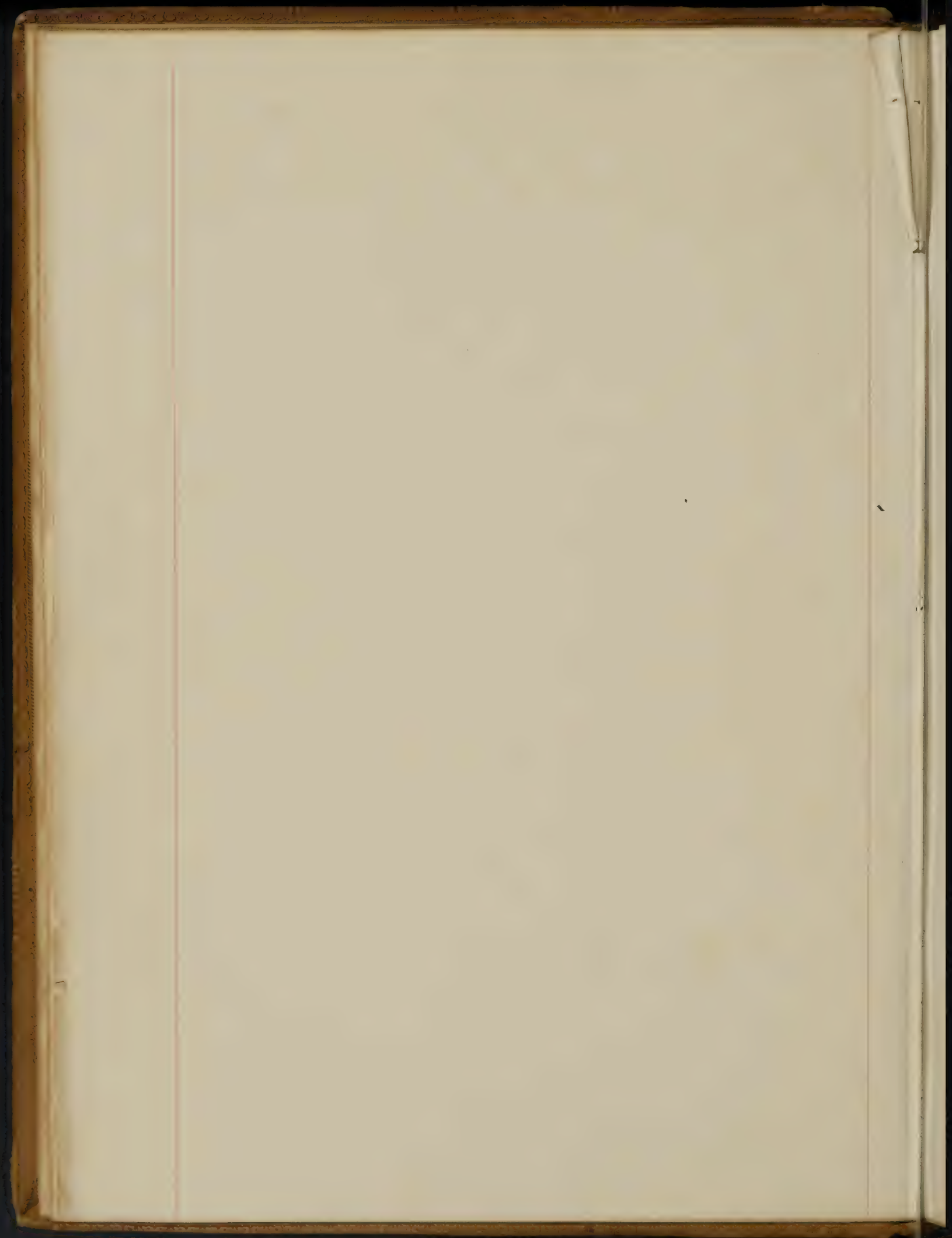




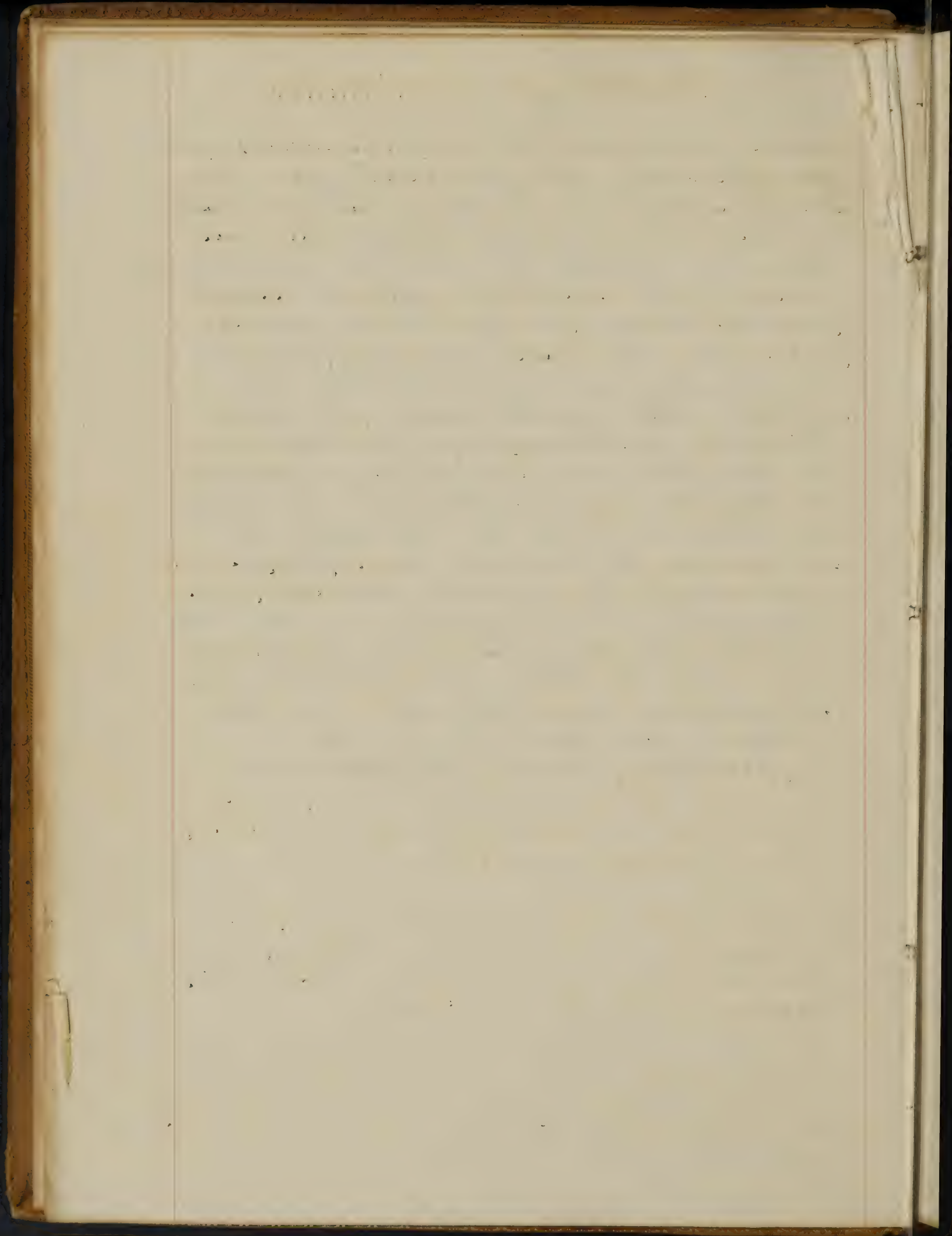








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Executors and Administrators

Executors and administrators are y Representatives of deceased persons. for certain purposes. 1st as to their Personal Estate, and as to y rights and duties wh affect such estates. Co Litt 209. a. 2 Bac 439.

An Exr is a Representative (ut Sup) appointed by the last will of y dec^d. His duty is, to execute y Task well. 2 Pol 503. or execute y will.

To make an Exr it aint necessary, y^t y word "Exr" be used. - It's enough, y^t y Testator's intention to make such person Exr, appears. as I commit all my goods to y disposition of A.

The appointment of an Exr is necessary to y Existence of a will. Plow. 281. Co Litt 111. 2 Pol 503 Godolph 82.

A disposition of Personal property in Contemplation of death, not containing an appointment of an Exr, is called a Testament. Off Ex 2. Dove 22.

So y^t there may be a will witht a Testamt and vice versa. Hence a testament naming an Exr and making a Testamentary disposition, of property, is called a will and Testament.

A Testamentary disposition of Real Property, is appropriately called a devise. But y word will is often used to denote a testamentary disposition of all kinds of Property.

Merely naming an Exr, without more, is by implication, a gift to him of y goods of y deceased. subject however to y payment of his debts.

To naming an Exr makes a will.

At C Law a testamentary disposition of lands without naming an Exr, was called a will. In case of chattels, called a Testament ut ante.

A Testamentary disposition of Land, not now so defined. see Post.

An adm^r is a Representative, ut ante, appointed by Law through its proper organ or minister.

2 BB 496.

He is appointed in these cases only. 1. where no Exr is appointed, 2. where he cannot act as Exr, 3. where he will not act as such.

Exrs are considered in Chy as Trustees to those who are entitled to y Personal effects of y dec^d.
1 C. Wm 381. 3 Atk. 520. Hence y Jurisdiction of Chy in cases of mere Personality, between Exrs and adm^s and next of Kin, Legatee, &c.

The heir is y person appointed by Law to succeed to Real Estate on y death of y ancestor. 2 BB 201.

The devisee is y Person appointed by Law to succeed to Real Estate, or rather entitled to Real Property by the Testamentary appointment of a deceased Person.

A Legatee is one entitled to Personal Property by a similar appointment Ibid 2. BB. 572.
G. Dolp. 271. 3 Bac 466.

The powers of Exrs over Personal property is merely yt of Trustees (ut Sub) in so far as they themselves

are entitled to it. (ut Post) Their Real Estate, Executors have not any such power, 2. Bac. 392. Munter 3. 4. For real estate was not originally Testamentary.

Executors may have y disposal of Real Estate, like other Persons,) by express appointment of Testator.

So if Lands are devised to be sold for y payment of Debts, y Executor tho' not expressly empowered to sell, is considered in Chy as y proper person, to sell, (no other being expressly empowered,) if y avails will be assets in his hands, Atk 420. Atter. y heir. is y proper person it seems. Pow. D. 299. 1. Lev. 304. "Devise" Tolle.

But an administrator as such, has in no case, any such power. Neither of ym, has any right to y Real Estate, (as such) in any case. Ibid.

It has been said, yt in County Executors do represent y deceased as to both y Real and Personal Estate - This ant correct. The Idea seems to have arisen from y heirs not being liable as such, to pay y ancestors debt: and from y deceaseds real Estate being liable, like personal, for all his debts. Executors have neither, "Jus ad rem, nor "Jus in re" and are not even trustees of Real Estate, as Executors do. They may have merely a power to sell in certain cases, granted by Probate, Post 104. That intermedling with Real Estate, don't make an Executor, de Lon Tort. see Post

In y ancestors death, y title in Lands, not devised vests immediately in y heirs. It must be in y heirs or administrators, &c. but it has often been decided, yt y administrator, too has it not. yt he cant maintain Ejectment, when y interest

of the Estate was Freehold.

Pending & settled even on Dissolved estate, & administrator cannot maintain trespass for an injury to the Real Estate, but the heir must do it, tho' he can't account in the case with the administrator for the damages. Decided in Court (N. H. county) The heir therefore may recover & land immediately, and Probate may still order a sale afterwards.

7 Deed of land sold under power from Probate, by an Executrix signed by her not as Executrix and in which she was named as such, nor the power counted upon, don't pass & interest. 1. Root 105. Such a deed was offered in this case rejected. T.C. 1802.

But such an omission may be relieved vs. in Chy. 1. Root 169.

The Legatee receives his legacy through the Executrix, for the legal title to all the Personalty is vested in him.

Ex. 25. 22. Dyer 254. 3. Jac. 487.

The devisee takes possession without the interposition of the Executrix. The rule same in Court. Why so? if the Executor has the same authority over Real as Personal Estate.

Liability of Assets to Creditors.

The personal property is charged with all the debts of the deceased. But in Eng. the Real Estate is liable for debts of Specialty & debts of Record only. 2. 3d 37. 243.4. 430.

et c. Law. & other since the Act of Westminster 2. see Post, debts of Records, or Pignort debts, charged Real Estate, from the first day of the Term in which they were recorded, and goods and chattels from the date of the Execution, now in the Act 2. They bind the lands, as vs

bona fide Purchasers, only, from y day on wh judgment
is signed and y goods be. only from y delivery of y
Execution to y officer, 3. B.C. 420.21. according to Old
Rule, judgment bound goods lands in y hands of y heir,
from y time of y original writ purchased. P

Specialty Creditors may resort to either, Real or Personal, 5.
estate of y deceased debtor; and if they come upon y Personal,
and it vates to discharge all y debts, y creditors by Simple
contract, are liable by C Law, to lose all their demands
(as y case may be) without any remedy at Law, since
they can't take Real Estate, and are postponed to Specialty
Creditors.

But in y last case, Chy will release y Simple Contract
creditors, by letting them in upon y Real Estate for so
much as y Specialty creditors have taken of y Personal
Property, and thus Simple Contract Creditors stand in y
place of Specialty Creditors, as to so much. (ut supra)

The Relief is afforded by Chy's ordering a Sale of y
Real Property, in y hands of y heir.

There is y same indulgence granted in Chy to guard General
Gen. Legatees.

If y avails of y Sale are non vatu, average is made.
The Spirit of y Chy Rules is adopted by y Court Law
but y Law there subjects y whole of y Real Property
at all events, to simple contract creditors, as well
as to those by Record or Specialty.

Y Creditor in equal degree, he who first obtains judgment
as an Executor is entitled in Eng to his whole demand
to y exclusion of y Rest. 3 P. 180ms 402. 401.

The Court Law as to Insolvent Estates, has established a different rule. and in Eng if one of two creditors, in equal degree, has commenced a Suit at Law, or bro't a bill in Chy as y rule now is, y Executor can't defeat his claim, by voluntarily paying y other.

In Eng if Land is devised to Executors, for y Paymt of debts, y Executor cannot for yt reason, be sued at Law, by a creditor as having assets. 1. Com. 401. 1. Roll 920. 2. D. 117m. 416. 2. Bern 105. Nor ^{can} he be compelled at Law, to make sale of y Land, y Land not being considered as assets, in his hands, so as to subject y heir at Law. But Chy will oblige him to sell and yt even tho y devise is not to y Executor, if it is not to any other Person. 1. asks 420.

Assets What? 2. D. 510.

Assets, there are several kinds. 1. Real i.e. such as descend to y heir and make him liable to such debts of y ancestor & claims upon him, as bind his Real Estate.

Second. Personal or assets i.e. such property of y deceased as comes to y Executor &c, as such and make him liable to creditors & legatees. Post 118.

Again assets are legal or equitable. Legal are such as go in a course of administration. i.e. rate y to y order and priority. Equitable such as are distributed among y creditors equally. "pro rata"

an Eqty of redemption of a mortgage in fee, is equitable assets, for at Law y whole estate is forfeited.

Is an equity of Redemption, in case of any mortgage $\frac{1}{2}$ an in fee, or not, is equitable assets. But in case of a mortgage in fee, y Mor has no other yn an equitable Interest, in y subject, quia there is no reversion. Post 119.

But if lands in fee be mortgaged for yrs, y reversion of y Mor, is legal assets. and creditors may have judgment, as y heir of y Mor, of assets, "quando accedat" 118. There is a stay of execution, till y reversion comes into possession.

In Court. equity of redemption is legal assets.

A Reversion expectant on y determination of an estate Tail, is no assets.

There is some contrariety in y authorities, as to y quality of assets arising from y sale of Lands, devised to be sold or directed to be sold, (tho not expressly devised) for y payment of debts. an they are legal or Equitable. Post 119

Kata to most of y older cases money arising from y sale of Lands, devised to, or subject to y power of y Executor to pay debts &c is legal assets. on y principle yt whatever comes to y hands of an Executor, as Executor, is legal assets.

Yet y latest cases and some of y old ones, considering y Executor in y case in y double character of executor and Trustee, have availed themselves of y latter character, and holden y assets equitable

These cases seem to have overruled y old cases or authorities. Post. 119.

8. Money raised, not ante by Trustees, is equitable assets by reason of Chy's exclusive jurisdiction over inter-trusts.

But it has been holden, yt when lands, (tho' charged with y payment of debts) descend to y heir and are not devised i.e. when y interest don't pass by y devise they are legal assets.

For y t^o fraudulent devises gives in such cases, y Specialty creditors, an action of debt at Law, as y heir of y obligor.

In conformity with y last rule, it has been holden yt money arising from y sale of Lands, under a bare power to sell for y payment of debts, sh^d be legal assets, because y land descends — y descent ant broken. 1. Atk 484, 3. Atk 030.

This distinction is exploded or rather evaded by La Thunlow, who held yt y descent was broken by a power to sell as by a devise (to sell) carrying y interest by express words.

Lands descending to an heir, are to be applied to y payment of bond debts, before lands specially devised can be taken. This rule is reversed, where lands are devised for y payment of debts.

9. According to ^{Common} Law, as in Chy, simple contracts debts are not as such postponed to debts by specialty. There is no priority founded on any distinction, between different securities, or Evidences of debts. Tho' there is a priority in cases, arising from y cause of consideration, out of wh y debt grows, & from y prerogative or privilege of y Creditor. as in y case

of Insolvent estates, funeral charges for last sickness, and debts to y State. (St Count 176.) after wh y remainder is divided "pro rata" Post.

If y Testator charges debts upon y heir, and y creditors resort to y Personal Fund, y Executors may come upon y heir for y amt. 12. where y Testator's intent is, y Personal fund shd not be diminished. This is distinct from y former rule, when y Personal fund is exhausted by y Bond Creditors, and y Simple Contract creditors are allowed to resort to y heir. The latter obtains only where there is a deficiency of Personal Assets.

In Count Real as well as Personal estate is liable at Law, for all debts of y deceased, but y ~~creditors~~ Executors cannot oblige y creditors to receive land in Paymt. Post 95.

In Eng y heir is unable, ut ante, for Specialty debts, to y amt of his debts assets, (Exp 248. Str 605.) but y obligee may sue y creditor Jc. if he pleades ~~207~~

So y obligee may sue y heir for ^{part} part, & y Executor for y other, but if he recovers judgment no both, and has a satisfaction from one, y other may be returned by audita querela.

Executors and administrators are bound by y contracts of y deceased, tho' not named, so far as they have ^{have} assets 2. Bacon. 443. Cro Ch. 187. Yel. 103. Menter 117. except when from the nature of y contract, it must be performed, if at all, by y Testator in Person.

The heir is not bound even by a special contract of his Ancestor, not expressly named, because kata the old feudal Law, no other property yn goods, chattels and annual profits of lands, (not the land itself) were liable to execution on a Personal contract of a deceased, or Tenant, and the heir as such, with the real estate only and now ergo not liable not by express word.

In an action vs the heir, tis necessary to alledge, and prove yt the ancestor bound the heir, i.e. yt he was named in the contract.

And even when the heir is bound, or rather when the obligation descends upon the land his body can't be taken in execution. The execution is vs the Land only.

The land is appraised to the creditor, not in fee, but while the Rents and profits shall discharge the debt. Plowd. 434. Land is liable in the hands of the heir, because there is action of debt, allowed at the Law, vs the heir, where he succeeds. 2. Bac. 323. 3. Co. 12. a. Cro. P. 450. This is the only instance in which land could be taken in execution, founded on Personal actions, at the Law. 2. Bac. 323. 3. Bac. 25. 3. Co. 12. a. 2. 36. 100. 3. 36. 418. 12. in behalf of a subject. For the King might always take land in execution in default of Personal debts.

11.

The Lands of a debtor, while in his own hands were first made liable for a first time, i.e. half a year in execution vs debt, by the Statute. 2. 13. Edw. 1. by Elejit. In the same term, by the Statute de misericordia, was enacted, enabling the debtors to pledge all his land, by a recognizance, in the nature of a mortgage, "Execution" 7.

The Person of y debtor was first subjected to execution for debt, &c. by St 25. Edw. 3. y^e gave y "cava"
3. Bac. 329. Execution "4"

Ex^r and adm^r are sued on y contracts of y deceased, only in y Detinet, not in y "debet" because they are liable in respect of Property wh they hold, for others, not in their own rights, they don't owe. 2. Bac. 443.

3. Co. 159. Sid 379. But charging ym in y debet and Detinet, is now cured by verdict under y St 16. 17 Ch. 2. (2 Bac ^{de. P. l.} 443. There is however an exception, where where y Executor &c is personally liable, as he may be in certain cases, as credit g^on for rent incurred on a lease for yrs. after y testator's death, for he is charged on his own possession - here y Testator &c was never indebted for y sum in demand

So he is chargeable in y Debet and ^{de} Detinet, in case 12. of a Devastant, 2. Bac. 444. 1. Sid 398. 1. Bole 603. 12.

after judgmt vs him as Executor &c. 5. Co 32. 1. bents 315. 3 21. de bonis Testatoris, for he shall not be charged with a Devastant, or mere Surmise. Post 122. 4.

The heir must be sued in y Debet and Detinet, because he has assets in his own hands, right, and y debt decends with y Land.

But charging him in y Detinet only, is cured by verdict.

At C Law. y heir cd defeat y Specialty creditors, by aliening y Land before action bro't. 2 Bac. 26. Co Litt 102. ante 4. But if aliened after y writ or bill filed, in R R. y land was liable in y hands of y Purchaser, and y judgmt had relation to y time of purchasing

of purchasing y original or filing y bill, in 3 Bae. 26. Carth 245. 1. Mod. 253. So y a Judgmt vs y heir, binds y lands by retrospect, wh is not so in case of a Judgmt vs y heir ancestor (ante). Now by 3. 4. Will. Mary, y heir in case of such an alienation before action is liable, as is his estate to y value of y Land sold but y land sold ant liable in y hands of a Bona Fide purchaser,

If y heir alien after action brot, is y rule as at C Law? Semble so. 3 Bae. 262.

It is held yt y Testator cannot bind his executor, when he himself ant bound. as a count to take B as apprentice. or yt his executor shall pay 100 £. No action lies vs y executor for y 100. £.

The rule cannot be Law. Note, a bond by a man yt his executors after his death, shall pay a sum to his intended wife. See Stur. and Wife. Ep D. 134.

8. LR
384. b.
2. Bun
13 53.

- 13 Formerly lands devised were not liable in y hands of y devisee, to be taken even by bond creditors - Here y creditors had no remedy at Law or Equity.

Now by 3. 4. Will. Mary - Devises of land are void as to bond creditors 3 Bae 27. 3 Bae 378. and y bond creditor may have debt vs y Devisee, and y heir both; and vs ym jointly. 3 Bae. 27. 1. Eqty Co. abr. 325. P. 9. The devisee cannot be sued in y heir is joined

But a devisee for y paymt of debts, or raising

portions for younger children, and within y^e t^e. Such
Devises are good and bondcreditors cannot defeat ym,
They are paid only like other children, pari passu.

The heir of an heir is liable for y^e bond debts of y^e
latter's ancestors, but y^e second heir is liable in no case.
(Judge supposes, further, y^e first heir had apolls.
and not so far. (Judge says) in the y^e second heir
has apolls of equal amount from y^e first.
1. Vern. 400. Dyer 344. 3 Bac 28.

The ex^{ors} and adm^{rs} are of y^e heir, are clearly not liable
for such, for y^e bond debts of y^e heirs ancestors, for y^e
heir himself, is only liable in respect of y^e land.
his person and charged. 3 Bac. 28. ^{Heir de F.} But tis said,
if y^e heir alien y^e Land to defeat y^e creditors, Equity
will follow y^e money into y^e hands of y^e Executor or heir.
Bac. Abr Heir de F 2 Vern. 32. 75

The heir as such, and liable in Court to pay any 14.
of y^e debts of his ancestor. For y^e whole estate of y^e debtor's
real as well as Personal, is subject to sale by order
of Probate, for payment of all y^e debts.

Heirs as such, are liable in Court at Law, on y^e
ancestors covenant of Warranty and. kate y^e decisions,
wh have passed "sub silentio" of Seisin. There an he
can be liable in y^e latter case, consistently with y^e decisions
in Tyler &c. vs Tiliang &c. for y^e breach occurs in y^e
Ancestors life time and y^e Executor seems the proper
person. The Executor in these cases, is also liable on
bond, &c. The heir and liable at Law. tho named.

Who May be an Executor &c.

All persons, who can make wills, (of wh post) and
some others may be executors Lovel. 155.

Persons of almost all descriptions may be executors,
w. a villein. 1. Com. 2. 53. Co Litt 124. Menter 23. 2.
Bac 375. So an Infant may be an Executor 2. Bacon,
377. Lovel. 155. Goldolphin 103. Menter 208. and an Infant
in ventre sa mere. Bac 21. A. 7.

If one appoints an Infant in ventre sa mere his Executor
and the mother be delivered of two or more, they are all
Executors.

An Infant cannot act as Executor, at C Law, till 17.
By St 38. Geo 3. he can't act in Eng till full
age, 5 Co 29. Tidd 31. 100. 1. 355. 445. Goldolph 102.
1 Tont. 76. 7. 6.

Till he attain full age, an adm^r durante minordate,
is appointed. of wh Post. Rob. 250. Lovel 155. 5 Co 29.
2. Bac. 38. 1. Tont. 76. Probate cannot be granted to
y him till 17. Tidd. 455.

15. Regularly acts of Infant executors, under 17. (21.
and binding by St ante) 2. Bac. 377. Menter 213. 14. Goldolph. 103. as
he can't sell y Testators goods, nor assent to a Legacy.
2. Bac. 377. Menter 213. 14. 1. Tont. 76. 5 Co 29. 5. and
even after 17. they are bound by an Infant assent
to a Legacy, nor he has assets to pay y debts.
2. Bac. 377. 1. Tont. 76. 1. Ch. Es. 357. Nor are they bound
by receiving debts, till 17.

Infants Executors can't sell Testators lease for yrs,
even to pay debts, if under 17. 2. Bacon 377. 1. Roll
730. But it has been holden, yt an Executor under 17.
or any other person by his order, may sell goods
to pay debts

This contrary to y General Rule.

An Infant Executor, is at age of 17. at C Law, bound by his acts, as executor, if done *kata* y office and duty of an Executor. but not secus. 2. Bacon 277. Menter 215. 6. 309. Cro Ch. 490. 5. Co 27. Mod 146. 852. 1. Com 249. He may discharge a debt on paymt.

But Infant executors of 17. or after, is not bound by any acts to his prejudice. as If he gives an acquittance of release without securing paymt. So if he assent to a Legacy (ut Supra) for in these cases, if bound, he wd be subjected for a devastavit.

Ibid Toll 330. Com. D. adm. C.

So if he gives an release for more yn he has received it ant binding as to y excess, 1. Com. 249. 5. Co 27. These acts ant done *kata* his office & duty as an Executor.

An Infant executor can in no event commit a devastavit till 21. 12. such acts as would amt to a Devastavit in an adult, will not bind an Infant Executor, 1. ibern 328. 1. Fonbl. 76. 7. 1. Com 249.

Therefore if a bond is forfeited, and An Infant Executor releases, on receiving y principal only, y release is no bar at C Law to an action for y Penalty.

If an Infant Executor, tho 17. yrs of age, when sued, must appear by Guardian, like other Infants, or tis Error. he cant make an Attorney. 2. Bac. 378. 3 Bac 180. 1. Role 287. Popph. 130. Cro P. 420. 441. For he has no remedy as an Attorney for mispleading - or as its said for neglect - but as a Guardian he has.

But if an Infant Executor sues as Executor by Atty, and recovers judgmt, it ant erroneous for he sues

in autre droit and y Judgmt is for his benefit,
and y Judgmt is for his benefit.

If an administrator sues by atty, tis said to be error,
tho' Judgmt is for him. 3 Bac. 150. 3 Wils. 180. 1 Rolle
288. Cro Ch. 451. Contra. This distinction is probably
founded on y Rule, yt an administrator can't act
till 21.

If an Infant and adult are Exec^{rs}, they may both
sue by Atty, for y adult may make an atty for y
Infant.

But if they are sued, y Infant Executor must
appear by Guardian. 3 Bac. 151. 3 Mod 236. For 784.

Secus y Infant Def might be made liable by
mispleading to costs. Id, "de bonis propriis" for wh
he has no remedy vs y Atty, but vs y Guardian
he has. nt Supra.

But an Infant Pltf ant liable even for costs.

17. By our Court It^s, an Infant may make a will
and therefore as has been supposed, may be an
Executor at 1st. By another It^s, every Executor in
Court, must give bonds, (tho' formerly there did nt
give bonds) It^s Court 168. There is no It^s
expressly enabling Infants at 1st to be Executors.
in Court. Does Quere. for an Infant can't bind
himself by such bond. Post 21.

2. Bac 378. A feme covert may be an Executor according to y
Law of y Spiritual It^s, 1st E. y C Law. Canon Law.
Henter 210. 3. She is considered as a feme sole capable of suing
281. 91. Goldolph. and being sued alone, and of taking upon herself
110. y office of Executrix, without y consent of her husband.
Oller 358.

But by y^e Law, y^e wife can't take upon herself
y^e office of executrix without y^e husband's consent. 2. Bac 372.

In England, y^e same widow y^e executor etc is y^e next of kin.
Therefore if y^e husband departs she cannot act, and if y^e
Spiritual Court and Comptroler do accept, a prohibition
will be issued. 2. Bac. ^{Ex. a. 8.} 378. Prenter 203. Executors
right to refuse y^e office see "Post" & Ibid.

So on y^e other hand y^e widow's consent is necessary, she
can't be compelled to take y^e executorship upon herself,
by y^e husband's consent or her own choice, but if y^e husband
actually administers, she is bound by his acts ^{during coverture} and can't
plead. Ne lingues Executrice. Bac Abr. Ex. A. 8.

So if wife actually administers, without y^e husband's consent,
and an action is brought upon, they are estopped to plead,
she was never executrix, or wrongdoer, and a wrong-
ful intermeddling not make her Executrix De Jure J. T.

If a feme sole be named Executrix and marry before
she intermeddles with y^e Estate: and yet y^e husband ad-
ministers, y^e is such an acceptance, as will bind her,
and she can never afterwards refuse it
there not after coverture? she is bound by y^e Act
supposed, not to have dispensed.

The King by y^e English Law, may be an Executor but he 19.
may nominate others to take upon ym y^e Execution of y^e Trust.
and they may be sued as y^e representatives of y^e deceased.

Corporations Aggregate, it has been said, cannot be Executors.
First, because it is a body formed for special purposes, Second,
because it cannot take y^e oath required for y^e due execution
of y^e office. This rule is rational, says Judge Gouldy
2 Bac 375. Ex. a. 2. 2d Ray 363. Aff. Ex 15. 25.

But y rule seems now to be, yt they may be, and
 Sole 3031. yt they may act by their sydic 12. persons appointed
 1 Role by ym, who receive administration with y will annexed,
 915. and who must take y oath, like other administrators.

J. J. don't think y Banks and insurance Companies can
 appoint Executors.

A Sole corporation, it has always been agreed, may be an
 Executor, because it can take y oath.

According to y Civil and Canon Law, apostates, Vnclers,
 Heretics, Outlaws and some others, could not be Executors.

By y Eng Law, no person is disabled from being an
 Executor by Public offences or y Civil or ^{imperial} Law.
 Bac as Outlaws and persons ^{attainted} may be executors, because they
 Co. a. 2. claim and sue in Auler Droit, 2. Bac. 375. Co Litt 128.
 1. Role 914. Item 184. But they cannot make wills,
 for their goods are forfeited. 2. 36. 499. Plow. 251.
 This last rule seems to result from a want of Property,
 and not from Personal Incapacity.

Persons excommunicated can't be executors, the absolution,
 Bac being excluded from y Church, they can't dispose of y
 Goods of y deceased, "in bonis huius" 2. Bac. 375. Co Litt
 134. Godolph 85. y is y only instance, it seems, of disqualification
 arising from y Eng Law, in Delictio. We have nothing
 to do with excommunication and of course there is no
 disqualification arising ex Delictio.

20. By y Eng Law, an alien Friend, may be an Executor
 or administrator Post, 1. Com. 235. Cro Ch. 8. 9. Menter 22. 17.
 He may have y administration, 12. disposition of chattels
 Real as well as Personal, Leases as well as Movables,
 because he holds in Auler Droit. Cro Ch. 8. 9.
 Secus by y Civil Law, except in case of

military Testaments wh are govered by y Jew Gentium -

Whether an alien enemy can maintain actions, as an Enemy, Executor or be appointed an Executor, all y authorities are not agreed, it seems he cannot, ni he has a safe conduct, or is protected by a Governmental Licence.

Salk 46.

On Ch 142. 683. Bac. Ex. a. 4. Ld Ray 282.

Co Litt 129. B.

Idots and Lunatics are incapable of being Executors, or admrs (Post) for they can't execute y Trust. 2. Bac. Ex. a. 5. Godolph. 86.

So if an Executor becomes Non Compos, administration may be committed to another, during his insanity. Salk 36 Bac. Ex. a. 5.

A Prerogative Ct cannot refuse to grant probate to any Person, ^{Ex} because he is poor or Insolvent or unworthy of Trust, for he derives his authority from y Testator.

Ld Ray 361. 1 PM 25. 1. Salk 36. 299. Carth 457. Loe 32.

Secus of administrators

Nor can y Prerogative Ct demand caution, or security, of y Executor on proving y will. since y Testator required none. Carth 457. Bac Ex. a. 6.

In Court. by St. all Executors, an poor or not, must give security for y faithful discharge of their duty, formerly not so. St. Court 157. 8. old Edition. 21.

Secus by y C Law. for y Testator required no security.

But Chy considering an Executor as a Trustee, will compel him like all other Trustees. to give Security if Insolvent. Carth 458. 2 term. 249. 1. Shaw 294.

Bac Ex. a. 4.

So when y Executor, tho not Insolvent, is wasting y effects, Chy will oblige him to give security.

So on an Suggestion of Insolvency, Chy will order y debtor of y Testator, not to pay y Executor. "pendente Lite" Bac Ex. a. 6.

Who may be an administrator

All persons not legally disqualified may be administrators, a person cannot act, act as administrator, or be adm^r Judge thinks till 21. for till then, he cannot give bonds to ordinary, as an administrator must.

Carm

445.

La Ray

338.

Lath 38.

the rights of an adm^r may devolve upon an Infant, till 21. or next of kin. (Post) but he cannot administer till 21. 2. Bac. 381. 5. Co 27. 9. It seems then proper to say, ^{an infant cannot be} an administrator for no one is adm^r till adm^r granted and y^e cannot be till 21. tho he may be entitled to adm^r before. (Post 44)

5 Moa 95. 12 Do 391.

This is different from y^e case of a Person, under 17. named Executor. He is Executor by appointment of y^e Testator. The Probate is only Evi of his being so. 5 Co 22.

22. A feme covert may with her husband's consent, be adm^r for she may clearly be entitled as next of kin. 2. Bac. 413. 2. Bk. 31. 2. Bk. R. 801. But she cannot with y^e husband's consent, as his right may be affected by it, and as he must give y^e adm^r bond, as he is abroad, or otherwise incompetent to act or decide. Fole. 31. 4. Burn's & Law. 241. Com E. act 15. 15. Talk 21. and y^e grant is to her alone, is not jointly with y^e husband.

If a feme sole executrix or adm^r marries, her husband is liable during coverture, for her acts committed as Ex^r before coverture, even to "a devastavit"

He takes her cum onere.

C. & B. 208. 227. 408. 602.

1 Roll 307.

The acts done under y^e Trust during coverture, are considered as his. Indeed he must act for her. At Law y^e husband with in y^e last case, is bound during coverture only. But in Eqly creditors may follow y^e assets into y^e hands of husband, after y^e wife's death. Not at Law

next rule see author

So too in the hands of an Executor of a husband. 1. Ben 309.
May not Legates and next of Kin also. pursue a assets in
Egty? 1. Ben 309- 2 Do 61. 118 1 Bac Ex 293-

An excommunicate can't be adm^t for he can't dispose
of a goods "in spiro nens" No such rule here.

1 P 1

An outlaw may be an adm^t, for he acts in "ante dicit"
and so may sue.

So Judge presumes, may a felon attainted, as in a
case of coexecutorship and for a same reasons

So an alien friend may be an adm^t as well as Ex^r 23.
"Causa qua tutori" Off. Ex. 1st Cro Eliz 142. 683.

The rule is a same as to an alien enemy. S. G. subpores
as in executorship. ante 20.

Poets and Lunatics can't be administrators. Godol. v 86.

The present rules of Succession, to Intestate Personal Estate,
were unknown to a ancient C Law.

It has been said, yt a disposal of a goods of Intestate,
belonged originally in Eng to a Spiritual C^r. 1. Lev 158. c. 186. 7.
Talk 37. 3 Bac. 397. But yo seems incorrect. Kato other
books. a king was entitled by old Law. to seize upon
a goods of all Intestates as Parens Patria - and gen Trustee
and to dispose of ym - 3 Co 38. 2. BL 494.

According to Pelden, a care and disposal of a Intestates Goods,
belonged to his Lord. 15. a Lord of a Manor. 1. Com 247. 2. Bac 397.
and a Jurisdiction of ecclesiasticks in testamentary matters, and
matters of administration, is said to have began in a time of
Richard Second.

+17

Afterwards it seems, y Crown invested y Prelates with y v
 1879 2 branch of y Prerogative. 2. Pl. 494. 1. Com 257. Berk 9. 486.
 200. Except so far as it had been previously granted as a franchise
 920 to Lords of Manors &c.
 39. 2 Pl. 494.

24. The Bishop in exercising y authority, disposed of y Goods of
 y Intestate "in pson usus" or broke his Trust.
 Plow 277. 2 Pl. 494.

This Power of y Ordinary drew after it, yt of y Probate of
 wills, it being thought reasonable, yt y will shd be proven
 to y satisfaction of him, whose right of distributing y goods
 of y deceased, was superseded by it.

The ordinary not being accountable to any one, in case of
 Intestacy, did as he pleased, with y whole, after deducting
 y rationales partes, or y two thirds of y widow and children.
 2. Pl. 449. For during y early period of y Feudal System
 in Eng. a ~~man~~ ^{man} having wife and children could bequeath
 only one third of his chattels and admⁿ extended to no
 more.

If he had no wife or no children, half was at his
 disposal and y ordinary's right of admⁿ extended to only
 one half. If he had neither wife nor children, he could
 bequeath y whole. "Post" and admⁿ in y case of Intestacy -
 was coextensive with y right of disposal 2. Pl. 491.
 2. 4. of course. If one died having neither wife nor
 children y ordinary had y disposal of y whole.

Ray
 487

The Ordinary wasn't bound to pay even y debts of y
 deceased Intestate, (1. Ray m. 437.) but where a will was
 made an Executor was always bound to pay y debt
 of y Intestate, to y extent of y assets. Term. (2 Pl. 495)
 For in y case, y ordinary's right of disposal, (which was,

discretionary, was superseded, while y Law stood thus, y ordinary disposed of y goods of y Intestate in person. he didnt appoint others. 2 Bl 95. 6.

The first check given to y power of y Ordinary, was by So of Westmins. 2 13. Edw. 1. 5 Mod 277.
 "4 1 Mil 7. Com. 378. This So obliged y Ordinary to pay y debts of y Intestate to y extent of the assets, as Cor^{rs} were obliged before to do. 2 Bl 495. 2 Bac 398. It gave creditor an action vs him. 1 Com. 257. 2 Bac 413.
 2 Do 133. 1 Role 906. This, it is said, to be in affirmance of y C Law. 5 Co 83. a. 9 Co 39. b 1 Com. 257. What C Law! Where is it to be found? 2 Bl 495. 2 Bac 413. Baym. 497.

The So of Westm. & still left y Surplus after y payment of y debts, to y disposal of y Ordinary. 2 Bl 495. The abuse of y remaining power, caused another Interposition of y Legislature, and a So was made 31. Edw 3 enacting y^t in case of Intestacy, y Ordinary shd deposit & depu^te y next and most Lawful friend of y intestate to administer. 1 H R. 679. 3 Bl 496. Ray. 498. Lovel. 2. 5 Co 82. b.

This So is y origin of adm^{rs}. 12. persons appointed by y prerogative Ct., to represent y Intestate as to y Personal Property. ante 1. 2. No adm^r existed at C Law.

Before y^s So ordinaries had begun to appoint others to act in their stead, but there cant one or be sued, being mere Servants to y Ordinary. The So 31. Edw. enabled adm^{rs}

admⁿ appointed under it, to sue for y recovery
of debts due to y deceased Dec. as Ex^r might
and subjected ym to actions by creditors, as
Ex^r were before subjected, and as y ordinary
was by Jo Weston. 2. 2 Bl. 496. 2 Bac 414.

But y Jo didnt oblige admⁿ to distribute y Surplus, after
after paying the debts. 2 Bl 570. Godolph 233. 1 Lev 233.
Carrk 120. 2 P Wm 447. Temple. host. 1 P Wm 8. This way
host required by the Jo 22.3. Ch. 2. Post 104.

Wherever y right of proving wills, and of administering
y deceased goods, may have originally resided, y
right of granting admⁿ. as well as of granting Probate
of Wills, now clearly belongs, in special cases to
to y Spiritual Ct in Eng. In ^{Conty} ~~Eng~~ This power resides
in y prerogative Cts, called in our Law. Cts of Probate
In some States. Surrogate, or Orphan's Ct. 2 Bl. 402.
398. Baymo. 4556. 1 Fild 359. 2 Bl 494. 5. 1 Roll. 906.

Bay. 497. Salk 37. and a will can't be given
in Cui in a Ct of C Law. to prove Title to personal
property till it has been proved in the Ecclesiastical Ct.
Doug. 586. Secus of a devise. Pow D. 708. 700. No Probate
of it is necessary tho' it may be proved in Chy.

"Devises"

It has been said, y king is y Supreme ordinary of y Kingdom,
and as such may grant letters of admⁿ. 2 Bac 390
But this Right of y king has since been denied.

But if a person dies Intestate, having no Kinred, his
usual for the king to grant admⁿ by letters Patent,
and y ordinary admits y Patentee, to administer.

But it is said, yt y^e admⁿ has been made
always not by Dureg. but courtesy or respect. The ordinary may
in such cases, dispose of y goods in "Pior nous."

Salk 37. 2 Bac. 393. Salk. 37. for he ant obliged in y^e can to appoint
an admⁿ. 2 Bl 495. 6. 505. as in the case of a Bastard.

dying Intestate, and having no wife, nor children. 2 Bl 400.
The king hath usage, is entitled to his goods, for y ^{Law}
Intestate has in such case, no next friend, or kinred in ^{Law}

In certain cases the Baron have by immemorial usage
a Custom, y right to grant admⁿ and prove wills, but
in no other way -

An admⁿ appointed in one State, can't sue in another.
y letters of administration being of no authority, out of y State
where granted 2. Vern 35. 6. 2. H Bl. 408. amb 25. 1. Hen Bl 154.
577. 3. 684. 90. 3 P Wms 371. In Court distinct admⁿ must
be taken. 4 Day 87. 96. 3. Day 74. To held as to Exec^r
obiter. 4 Day 96. There in case of an Exec^r appointed in
another State, if y will be proved here, is Probate necessary
P. G. wd think not. but see Branch.

By St Edward 3. ante. y ordinary is to grant admⁿ
to y next and most lawful friend of y Testator. 1. Com 261.
These words have been construed to mean, "next of Blood,"
who are under no disability. 2. Bl. 496. 3 Co 39. 6. 3 -
Yet it has always been held, yt a husband* is entitled
to administer on his Wife's Estate. 4 Co 57. 3. 3. Do 32. Dec Ex 7.
2 Bl. 522. 2 Wms 44. Dec. 81?

For y different grounds upon wh his claims have been supported,
see Toller 83. 4. 10 Ch. 106. Halk 36. 1. P Wms 44. 3 Ves Sn. 244. 30 52.
2. Bl. 515. 4. Co Litt 51. according to some he is entitled "Pure
mainte", at; P Law.

Is a wife entitled to admⁿ on her husband's estate,
to appear, yt she was appointed in one case, and yt to y
exclusion of y husband's Kindred. Day 498. Bl. 2. Bee. 414.

This St is y origin of admⁿ "ut ante 25.) 2. Bl. 496.
Toller 82. 18 as officer of y prerogative Et to administer
Testator's effects.

If there are several next friends. i.e. friends in equal
degree. y ordinary might, it seems, under yd St. select
y most fit of ym. Toller 83. Page. 439.
But all y auth don't agree.

Item 310. The power of y Ordinary was enlarged by St 21. Hen 8th which allows him to grant admⁿ to widows or next of kin. or both, and when 2 or more are in y same degree, expressly gives him y power to appoint wh he pleases, Next friend & next of kin seemed to have been synonymous, except yt y husband was excluded in y first word. 2. Bb. 436. 2. Bac. 414. Lovelace 2. 1. Com 261. 2. Bb 514. This seems to have been considered as explanatory in some measure of Thirty first of Edw. 3. And it gave y power of appointing y next of kin to y wife or of joining ym. Upon y footing of these Sts. (2) y General Law of admⁿ stands in Eng at y day.

This latter St dont seem to give y admⁿ to y husband on y wifes death, but he has always been held entitled.

Admⁿ were not liable to distribute y Surplus to y kindred of y deceased, but there has been some dispute on y point. 2. Bb. 515. 8. Co 135. Goddard 253. 4. 1. Lev 233. 2. P. M. 447.

But now by y St of distribution. 22. 23. Ch. 2. admⁿ are obliged to distribute. But husbands admⁿ of their wives or wives. are by St 29. Ch. 2. declared not to be within y St 22. 23. Ch. 2. and are exp. bound to distribute.

29. If after wifes death, y husband dies before admⁿ taken his representatives, it has been held, wille be entitled to admⁿ on wifes estate. As y exclusion of y next of kin in Eqty and y Ordinary is said to be compellible upon to grant it Lovelace 2. 3. 2. Bb. 514. 3 atk 526. 1. P. M. 381. 2. The Wife. 74. The husband is even called "next of kin" in one or 2. cases. 1. P. M. 381.

But tis now held, yt her next of kin are entitled to admⁿ by y word of y St 31. Edw. 3. but they are still Trustees in Eqty for y husband's representatives.

If y wife Executrix to another person, dies admⁿ of y goods wh she has at her death, as Executrix, goes not to her husband, but to y "next of kin" to her Testator for as y beneficial interest went to her, he has no claim to ym. 3 Talk 21. Lovelace 3.

By y 31. Can. 3. and 21. Hen 8th, y ordinary is compelled to grant admⁿ of y husband's effects to y widow, or next of kin, but he may grant to either at his election or to both. Love 6. 3. 2. Bb. 490. 504. Talk 36. It 552. i. Can 261.

Ray 93. Show. 354. 1. Vern 315. Where y Intestate leaves no wife, admⁿ goes to y next of kin and among kindred those in y nearest degree are preferred. But of next of kin, in equal degree, y ordinary may take wh he pleases Love 4. 2. Bb. 504. 496. Ray 208. or 98 Talk 38. This is a Gen Rule. exceptum "Post"

Admⁿ when granted to two or more, may always be joint and in some cases, it may be several. Several adm^{ns} may always be granted of several parts of y goods. as admⁿ of one part to y wife, of another to y next of kin. as Children Parents. Brothers &c Lovelace 4.

4 Roll 908. 1. Show 351. Post 42. In such cases they are severals aliter if admⁿ of y whole, or of one and y same part of y effects, is granted to 2. or more, tis then Joint. Tal 36. 1 Ed 10. It 4.

But of an entire thing, as a bond for 100 £. admⁿ can't be granted, if two are appointed, they must jointly appointed. Love 4. Talk 36. 1. Ed 100. Nor can there be several adm^{ns} of y same ^{whole} assets.

The degrees of kinship are computed kata y Civil Law, not kata y Common or Cannon Law, therefore children are preferred to Parents, for according to y Civil Law y continuation is from y deceased as "Terminus a quo" and don't ascend among Claimants, but in defect of Children

yet both are in equal degree, 2. Bac. 415. 2. Bb. 514.
 Lovel. 4. Godolph 283. 2. Vern 125. Toller 88. 90. The
 order is, 1. Children, 2. Parents, 18. & Father, (if
 of Precedence) if living, if not of mother, 3. Brothers, 4. Sisters,
 4. Grandfathers, 5. Uncles, or nephews, Cousins 6.
 In Ch. 527. 1. P. Wm 41. 1. Alms. 455. 3. So 762. Females
 are entitled equally with Males, in the same degree,
 2. Bb. 510. 4. 5. Love 4. Tole 90. Com & adm^r. B. 6.
 Kindred by the Father's and Mother's side are equally
 entitled. Toller W. Com. & adm^r. B. 6.

In computing degrees, Proximity, not quantity of blood,
 is regarded. Therefore half blood is equally entitled with
 whole Blood. 2. Bb. 505. 1. Bent 316. 23. 425. So 74. Tole 91.
 .. Vern 437. as a brother of a half blood an uncle of
 a whole. 2 Bb. 501.

As to claims of a next of kin or a next friend, as Son,
 Brother, Sister, extend to their representatives, so yt representing
 as such, shall exclude ^{more} distant kindred in their
 Parents. The St. J. G. believes, don't mention ~~Representatives~~
 Representatives, nor do the books generally, as 2 Bb. Lovelace
 Godolphin, but it seem that one authority, yt under
 St. 31. Edw. 3. a right of representation does obtain as
 in distribution Ray 298. 2. Bac. 414. Lucr. & order
 under St. 31. Edw. 3? is said to have been, 1. of husband
 or wife, 2. of Children or their representatives, 3. Parents,
 4. Brothers or Sisters, and their representatives.

31. If none of the characters just mentioned, i.e. husband, wife,
 next of kin, will accept, a creditor may by custom be
 adm^r in Eng. He is a next Claimant. 2. Bb. 505. Love
 5. Talk 38. In default of all these adm^r may be committed
 by the ordinary to such distant person, as he approves of.
 2. Bb. 505. Plow. 278. Love 5. So before St. Edw. 2.
 2. Bb. 505.

If there is no husband, wife, or kindred, & his heirs at law, appoints or rather recommends. Talk 37. ante. and ordinary appoints of course. Lovel. 584.

If an Executor refuses, admⁿ must be granted, cum testamento annexo. This is expressly required by St 21. Hen 8th. But in y^e case, y^e St 31. Edw. 3. and 21. Hen 8th don't govern y^e Ordinary in selecting y^e admⁿ, for these Sts extend only to cases of Intestacy. He may grant admⁿ to y^e Residuary Legatee, in exclusion of y^e next of kin. 2. Bl. 505: 1. Vent 210. or 219. 2. Bac. 286. 1. Sid 287. 1. ² Allen For y^e St 21. Hen 8th requires it to be given to y^e next of kin, on presumption y^t y^e deceased intended to prefer y^e heir, but here there can be no such presumption. for y^e residue is given to another. But may y^e Ordinary appoint any other yⁿ y^e Residuary Legatee, if he were disqualified? It seems he may. 2. St 505 Post 49. Suppose y^e Testator dies Intestate as to part. 1st. no residuary legatee is appointed, since as to y^e part y^e case don't differ from common Cases of Intestacy. 2. Bac. 386. Dy 372. Show 25. Godol ²³¹ 230. y^e next of kin would be entitled, & G Presumes. If y^e Residuary Legatee when appointed were entitled to admⁿ ut Tutor, also dies, his next of kin, not y^e Testator's must have admⁿ it seems. Godolp 230. And Godolp speaks only of an Ex^r who is universal or residuary Legatee.

It was observed. ante 31. y^t in defect of all these characters. y^e ordinary might commit admⁿ to such distant person, as he approved of. as he might have done before y^e St 31. Edw. 3. The person thus appointed, may now it seems, be a proper admⁿ 2. Bl. 505. Plow. 278. 32.

Lovel 5. And before y^e last mentioned St, he was merely an atty or servant to y^e Ordinary ante 25. 2. Bl. 505.

Plow 278. ^{Bac 413.} ~~Lovel 5.~~ Or in y^e case y^e ordinary may grant

letters to such persons "ad collegandum bona defuncti" wh^{ch} neither make him Ex^r or admⁿ but a kind of Bailie or Trustee

adm^r

of Transmitting y Trust of Executors &c
 If an adm^r dies leaving any part of y assets unadministered,
 his Exec^r ant adm^r to y Intestate, but an adm^r
 de bonis honⁱ must be appointed. Lovel. 6. Went C. 12.
 2. Bac. 385. 2. Bl. 506. y adm^r can't transmit y Trust
 reposed in him to another, because he has no interest
 or power in what he derives from y Ordinary, and these
 are strictly Personal, y trust therefore results to y Ordinary.
 1 Roll 907. Godolph. 2 Bl. 385. 6. 2. Bl. 506. Bac Ea. B. 2.
 230.

Intestate.

So if an adm^r dies (Int Int) his adm^r ant adm^r
 is y first Intestate. for there is no ^{priority} between y Second
 adm^r and y first Intestate. 2 Bl. 506.

A can have no adm^r in one is appointed on his 'State, 35.
 but y second adm^r is appointed to adm^r y effects of y
 first adm^r only, not of A. Adm^r then must be granted
 "de novo" on A's Estate, if any thing remains to be administered.
 But y Ex^r of A's Ex^r (A's will having proved y first
 will) is y Executor of A. 1. Corn 251. and so on through
 a continued series of a succession of Ex^rs, however remote. 2 Bl.
 506.
 (Post 131) for y power of an Ex^r is founded on y appointment
 of y deceased and y appointment is founded on a Special
 confidence in y Ex^r 1. Atk 460. Pre Ch. 179. He may ^{sell}
 therefore transmit it to any one in whom, he has ^{243.}
 equal confidence, i.e. if he proves y will, but not ^{259.}
 otherwise for then there can be no legal proof of his ^{Com. adm^r}
 Executorship. ^{3. 12.}
 Talk 305.

If P. leaves two executors as A and B. and A dies
 leaving C. his Ex^r during y life of B. C ant Ex^r
 to P. y whole authority survives to B. But if after
 A's death, B dies, leaving D his Ex^r D is ex^r to P.
 Bac. Ab. E. C. 3. Talk 311. 2 Bl. 506. Talk 127.
 405.

But y adm^r of A's Ex^r is not y representative of A.

1 Roll
907
Bac. Ex
B. 2. 1.

for y adm^r in y^e case has no relation to A. There is no privity between ym. 1 Com 251. y adm^r is commissioned to administer y goods of A's Ex^r only. not those of A original Testator. 2. Roll 506. Godolph 230. 5 Co 9. b. Therefore administration de bonis non cum testamento annexo Post must be granted

36. If B. leaves his Ex^r and A dies leaving B an Infant his Ex^r and adm^r durante minoritate of B. is granted to C. C ant y representative of B's.

Stiles
225

Whenever ergo y course of adm^r refers from Ex^r to Ex^r is interrupted by any one adm^r and all y goods ant administered. Adm^r must be granted afresh, if y goods not administered by y first adm^r or Ex^r 2 B. 506. Str 225. 1. Roll 918. and y^e adm^r de bonis non" is y only legal representative of y deceased in matters of Personal Property.

Adm^r "de bonis non" may like an original adm^r be Special i.e. of certain Specific parts of y effects. not administered. y rest being committed to others.

Manner of Proving Wills

Bac. Ex
B. 8.

The ordinary may ex officio or at y instance of any party interested, cite y Ex^r to prove y will. But some, The Ex^r may be cited at y instance of any person. y^e latter may know an a legacy is left him. 2. Bac 403. Godolph 60. In Court, tis y Executors duty to appear voluntarily within 30 days after y Testator's death, to prove or refuse i.e. when he knows of his appointment.

appoint
some person
to take care
of y goods

The ordinary may [#]requester y Testator's goods, till y will is proved. 2 Bac 403. Godol 60. Bac Ex. B. 8.

There are 2. modes of proving wills. in Eng. 1. in Common form. as where y Executor presents y will witht citing y parties interested, and deposes himself: yt it is y true, last and whole will of y Testator. and y Judge upon yo proves it. 2. Bac. 403. Godolph 62. This is sometimes done where there is no contest. Bac Ex. E. 8.

Sec.² In Form of Law. 12. where y next of Kin and widow are cited to be present, and witnesses are examined.

Ibid

Where an Exr proves a will in Common Form, he may be compelled to prove it again in form of Law. Secus where y first Probate is in form of Law. Godolph 62.

Comit
L. 60. 17.
19-1. 2

Godolph 602.

The probate of a will in Common form, may be questioned at 33. at any time within 30 yrs next after. Secus when proved in form of Law. 2. Bac 403. Godolph 62. Bac E. 8.

Executors Refusal

The office of Exr being private and being named by y Testator, and not appointed by Law. he may refuse to accept y ^{tr} Executorship in y first instance and then administration ^{cum} Testamentis annexa must be granted. Off. 36. Godolph 140.

Bac. Ex. E. 8. 400.

But it is said, yt y ordinary may compel y Exr to prove y will and make his election to accept or refuse y Executorship, but he can't compel him to accept also. Godolph 61.

But an Exr can't assign his office, it being Fiduciary —

Bac. Abr. Ex. E. 8. Toller. 41. 2 How. 202

Nor can he to any effect, refuse by any act in Pais, as by a declaration, yt he will not accept 12. yo will not alone bind him. It must be by some act recorded in y Spiritual Ct 2. Bac. Ex. E. 8. 405. Menter 37. 8. Moor 272.

Toll 42. Cro Elvi 92. In y case of Cro Elvi however, when y Exr refused, y record was only, yt they desired to accept. Yet y renunciation was held binding. ‡ But he may

It is y general rule, first yt whatever an Exr does respecting
y estate of a Testator and in show an intention in him to accept
y office, amounts to an admⁿ, so yt he cant post renounce.

Second, any act w^h wd make a change, Exr Ex Von Cort
is an admⁿ and is deemed an acceptance of y executorship.
2. Bac. 406. 1. Roll 917. as Taking possession of y Testator's goods,
and converting ym to y Executor's own use. 1. Roll 717. Dyer 166.
Henter 39. 2. Bac. 416. So taking y goods of a Stranger and
administering ym under an apprehension yt they were y
Testator's. 1. Roll 917. 2. Bac. 406. Aliter if he takes y goods
of y Testator, claiming ym as his own. ff 39.
So if he receives or releases debts due to y Testator

So if there are two Executors and one without y other's consent,
takes possession of a specific chattel, bequeathed to him by y Testator;
as is an admⁿ, for y Legatee cant take his Legacy without
y consent of y Executor.

But in these cases if y Judge, knowing yt y Exr has 41.
administered, will turnen accept his refusal and grant
admⁿ to another, y grant is good and y Exr cant post
resume y office.

Yet if after admⁿ granted only because y Exr did not appear
on summons, he proves y will, y Exr chooses to accept, he may
do it and y admⁿ must be repealed.

And if after y Exr has refused and admⁿ has been granted
to another, it appears to y Judge, yt y Exr has administered,
before (refusal & y purposes) y Judge may repeal y admⁿ
and oblige y Exr to accept.

If y Exr appears and takes y usual oath, viz yt he will
justly execute y office. 1. Ray. 363. he cant post renounce Bac
for he has by y oath accepted, nor can y ordinary refuse to E. 8.
admit, tho' after taking y oath, he had refused, if he does

Granting

42.
Adm^{ts}

Toll 119.

as Mandamus lies, commanding a Judge to admit him.

The Manner of Granting Adm^{ts} and in what Co granted.
This head includes y different kinds of adm^{ts}

It can't be granted by Parol 1. Com. 263. Dub. Dy 294.

1. Show 408. 408. Godolph 231. Com. 2. ad^r B. 7.

It must be done by writing, tho sealing isn't indispensable.

9 Co
39.

Adm^{ts} is granted, 1. where one dies Intestate. 1. Com. 258. 30.

Co 39. Stat 31. Edw. III. Here y Person entitled to y adm^{ts} by Law, has a general authority and acts for himself as Adm^r 18. not for another, who has a Superior right.

For y oath required of Adm^{ts} Toll 96.

The ordinary may take bonds for due adm^{ts} in all cases, even where tis cum Testamento annexo 1. Com. 253. Com. 2. ad^r B. 7.

It may be granted to two or more. ante 29. 30. and if one dies y office survives ^{to y other}. It is different from y common case of a delegated authority, as a letter of atty to two, where on y death of one, y authority ceases. But adm^{ts} is rather an office.
Bac Ab Ex. G.

2 Com
514
1 ad^r 462.
Com. 2.
ad^r B. 7.

Several adm^{ts} may be granted of distinct things, not of one entire thing. as a Bond for 100 £. ante 29. 30. 1. Com. 263. 1. Toll 918. 1. Sid 410. 1. Talk 30. 3. Bac. 410. 394. Bents 12. Godolph 78.

Bac
Ex. G.

1. Toll 914. If a Person is made Executor without any limitation or restriction, he can't renounce as to past. as He can't waive a Term, tho of less value ym y rent. He must renounce in Toto, if at all. The same rule obtaining, in cases of adm^{ts} granted General. P. G. supposes.

43. Second was formerly supposed, or rather doubted, an it wd be granted to one, during y absence of y Executor. out of y Realm, tis now settled, yt it may be. tis held to be within y Stat or then T. writ. 1. Mod 14. 15. Talk 42. 3. Id 23. La Ray. 107. 1. Rolle 208. 5. Mod 314.

of y^e will. 2. Bac. 286. Salk 304. 5. 1. Rule 937. So if one makes
a bequest and masses names no Ex^r adm^r is granted as
in y^e last case. Corn. D. adm^r b. 1. 2. 36 313. 4. 8.

9th. But if an Adm^r dies, leaving part of y^e goods un-
administered, adm^r de bonis non granted. -
2. Bac. 385. 2. Hb. 508. 1. Rule 907. 2 Bl 556.

10th. If an Ex^r dies Intestate, after proving y^e will, adm^r
de bonis non. "cum testamento annexo" is granted -
2. Bac. 385. Salk 304. 5. For here y^e Ex^r has administered in
Part. When y^e Ex^r in this case, dies Intestate, y^e Testator
is said to die Intestate. Rule 910.

11th. The adm^r de bonis non is entitled to administer to all
y^e Personal Property, of y^e deceased, not remains unadministered -
and in Species as Terms. Household Goods, &c. 2. Bac 385.
Salk 305. Tiffin 143. So to money received by y^e original
Ex^r &c, as such and kept by itself, for it can be
Identified Salk. 306. So to debts due to y^e original
Testator.

12th. But if y^e original Ex^r &c. has taken a note for a debt,
due to y^e Testator &c, y^e acceptance of y^e Note or other security
is such an alteration of y^e Property, yt y^e note vests in y^e
Representatives of y^e original Ex^r &c, and not in y^e adm^r
de bonis non - and they are accountable for y^e debt.

13th. By y^e Old Rule of Law, in Eng, if y^e original Ex^r &c had
not an action and recovered judgment and died without taking
execution, y^e Adm^r "de bonis non" could not sue out y^e
Ex^r or in any way take advantage of y^e Judgment not
being Privy to it. 2. Bac 386. 7. Helverston 38. 83. Salk
140. Sid 129. Now by St 17. Ed 2. § 1. Jam. 1. y^e adm^r
de bonis non may have a *Scire Facias*, on y^e Judgment
when it is rendered on a Verdict. 3. Bac. 386. 7. 6. mod

290. Salk. 322. 3. La Raymo, 1072. x. why no provision is inserted. B. G. cannot see.

10th If y Ex^r be under y age of 17 admⁿ durante minoritate 12. till he obtains 17 yrs, now by St 38. Geo. III. till he is of full age, ante 14. must be granted. Com. 250. 58. 5. C. 29.
b. Lovelace 192. 3. 3 M. d. 24. 2. Bac. 381. Menton 307. Godolph. 102-102. . So if y Person entitled to admⁿ be an Infant. of any age, admⁿ durante minoritate, 12. till he obtains full age, must be granted. Bie Ex. 31. Com. 3. 159.
Tabl 39.

An admⁿ durante minoritate B^e, being but a Curator, for y Infant, y ordinary may appoint whom he pleases—

This laid down 5. C. 29. 6. y^t admⁿ granted durante minoritate of an Infant Ex^r under 17. determining on her marrying a Person of full age, as he becomes interested with her in her right as Ex^r and is of age to act. This is denied to be Law. 1. Com. 250. 46.

If an Infant and a Person of full age, are Ex^{rs}, admⁿ durante minoritate is not granted to a third Person, Bac Ex 3. 1. for y one of full age may execute y Will, and ergo admⁿ to a 3^d Person is void. Lovel, 193. But it is said, y^t 2. Lev 239. 40. y Ex^r of full age, may take admⁿ durante minoritate — and declare as Ex^r or admⁿ durante minoritate — 2. Bac. 381. 2. Lovel 239. 40 — Brown 46. * What Purpose they can serve, B. G. can't see, for one Ex^r can always act for y whole.

If 2. Infants are Ex^{rs} and one of y age of 17* and y other under, y former may execute y Will, and admⁿ 193. durante B^e ant^e to be granted. Love 173. In y^e case. B. G. concludes, y^t y older Ex^r can't take admⁿ durante B^e, for no Person but an adult can be an admⁿ.
* See 45.

If B. dies, leaving A his Exr and A dies, leaving B, an Infant his Exr, D. C. is appointed adm^r durante Jc of B. B. ant^y Representative of B. tho' he acts for B. who is B.'s ex^r 2. Bac 381. Cro Eliz 271. There must be an Adm^r of B. appointed durante Jc of D.

The Authority of an Adm^r "Durante Minoritate"
Is said in Comyn, yt an adm^r durante Jc of one entitled to adm^r has for y time all y Powers of an absolute Adm^r.

But it seems, to be established, yt an adm^r durante Jc, has not such a general Property in y effects of y deceased, or such a Gen authority as an Executor or an absolute adm^r has. for his authority is given ad commodum et Properein Executoris" Jc. or pro bono et Commodis Jc.

So yt he is in y nature of a Bailiff to y Infant Exr or adm^r. 2. Bac. 381. 5 Co 291. a. Cro Eliz 718. 1. Com. 250. 3 Leon 103. These authorities relate to y case of an adm^r durante Jc, of an Infant entitled to adm^r.

The authority of an Adm^r durante Jc. is generally, tho' not always granted ut Sub. ad Commodum et properein Executoris" or "pro bono commodis" Infra -

Yet tho' his authority is Special, he may generally do all acts, wh are incumbent on an Executor, and wh are in Legal presumption, for y benefit of y Infant. and y estate of y deceased -

As he may assent to a Legacy, if there are other assets to pay debts, but not Secus. 5 Co 22. 2. Bac. Ex 3. 1.

An Exr may assent under any circumstance, tho' at his Peril. ^{Infra}

So he may sue or be Sued - 5 Co 97. 13.
Bac. Ex. 3. 1.

But as he can do not ^{his} the y prejudice of y Infant, he can't sell y goods of y deceased, ni for y payment of debts,

wh is a case of necessity, or in they are penishable -

5 Co 29. 6 Cro Eliz 719. Bac Abr. Ex 31.

He cannot make a Lease of a Term, vested in y Exr
2. Bac. 381. 2. 1. Comyn 251- 5. Co 29. 6. 6. Co 67. 6. There is
however an Exception, to y Rule. when admⁿ durante l^e
is granted Generally l^e. not ad commodum et Propriet^{is} -
Here he may lease a Term vested in y Executor and
till good till y Exr attains y age of 17. 2. Bac. 381. 2.

6. Co 67. B. But it ant laid down, yt an admⁿ
even in y case, may sell y goods of y deceased
in for y Paymt of such debts l^e. ut Sup. see last Section.

When Admⁿ may be ^{re} Repealed and The
Consequences of Repealing it. r

As an omi holden, in some cases, yt y Ordinary cd not
in any case. repeal Letters of admⁿ once granted - 2. Bac. 410.
he having executed his power -

~~Bac Abr. Ex 12.~~

~~Talk 67. Love 18. 1.~~
Cro Ch 45. Ray 93. 1 Fel. 129.

But tis now clearly settled, yt admⁿ may be repealed,
by y Ordinary for various causes 3 Bac. 410- Lovel 18. 9-
Talk 67. This not arbitrarily 1. Com. 263- Lovel. 18. as
as l. where unduly obtained, as if admⁿ is granted on
y grounds of a supposed Intestacy - when there is a valid
will. Hence an Probate of y will, admⁿ must be
revoked. Lovel 18. 47. 1 Rule 90-7. It must be repealed
by citation. l^e. by y Ct wh granted it - a Repeal
by appeal, is by a high Ct.

Second. When in case of actual Intestacy - admⁿ is
granted to one not legally entitled to it, as to next
of Kin - to a Sonne Covert excluding y husband.

Here it must be repealed, in favour of y Husband,

Lovel 18. 3 Talk. 22. 1. Comyn. 263- 1. Id. 409-

So if granted to a Stranger where there are kindred
not disqualified. 1. Com. 263. 1. Talk 38. Lovel 19- 4 Burns.

E L. 236.

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So if granted to next of Kin "cum testamenti annexo" when there is a residuary Legatee - 1. Com. 263. 2. Lev. 50. 1. Bent 128. ante.

Bac
Ex E. 12.

Third Where obtained by false suggestion of any kind, or fraud, it may be repealed - 2. Bac. 418. 1. Sid 292-370. 2. Kel. 53. 72. So when obtained by surprise, on y ordinary ad where he grants adm^e on a wrong suggestion - this possibly not fraudulent. Sid 911. Lovel 19. * as he represents himself as next of Kin.

Bac Ex
E. 12.

Fourth So if it be obtained in an irregular manner as witht citing y Parties, as required by Law - to be cited. 1. Com 263. 1. Lev 305. 4 Burns C.L. 236. Lovel 19. So if obtained witht giving security to account for, or witht in 14. 2. Bac. 410-2. Kel. 54. Said in Kel. in 15. days. So if after adm^e granted, or new adm^e be obtained by fraud, witht a Repeal of y First and y Second, y adm^e releases, his adm^e must be repealed. The Release is void, 1. Com 264. Dyer. 339. 339- d. Co 19. u.)

Second. Adm^e duly obtained, may be repealed in consequence of matters "Ex Post Facto" as if y original adm^e should become a Lunatick or otherwise Incapable. 1. Com. 263. 1. Lev 158. 1. Sid 373. 1. Kel. 545. So "E contra" if y Person legally entitled, is incapable at y Testator's death, and adm^e is for y reason, granted to another, so adm^e may be repealed on y former's becoming Incapable, Lovel 18, 19. 4 Burns C.L. 236. 1. Com 263-1. Sid 372. 3. Ecc.

Adm^e tis void, may be repealed witht a sentence of Revoation as by Granting a new adm^e wh is itself a Repeal - Lovel 19. 4 Cr Law 237. Cro E 460- 1. Sid 371. 4 Burns C.L. 237.

General Rules

When y only objection to an adm^t granted, is yt it is
to a wrong person, y grant isn't void but voidable -

Id Ray 684. Com R. 95. Talk 38. Therefore if adm^t
is regularly granted, tho to a wrong person, and is first
repealed on a Citation by y Ordinary - all y intermediate
lawful acts of y first adm^t are good - and if he
give y goods of y Testator to another, for y is a
lawful act &c. such as a rightful adm^t may do,
The effect of a Repeal on Citation, is y same in all
cases, when y first grant of adm^t is only voidable.

Toll. 129. 30. Com. D. adm^t B. 9. 1. Com 284. Lovel 60-65.
Cro Elvi 460. 6. 6 Co 18. B. 6. Mod 396. In y
case if y first adm^t was a Creditor to y Testator,
he may retain like any rightful adm^t, to satisfy his
own debt. Talk 38. Id Ray 684. Com R. 96. 2. Bac 412.

But if an adm^t whose letters are repealed by adm^t
Citation made a Gift of y Testator's Goods - by Covin.
before y Repeal, y gift is void as to Creditors by
Lo Elvi 13. This good as y Second adm^t 5 Co 18. B.
Lovelace 50- 3 Bl. 64- Toll 29- or 129- 6. Co 18. B.

Yet in y last case, if y first adm^t is set aside, 51-
on an appeal to a higher Ecclesiastical Jurisdiction. 3 Bl.
64- or 641- y intermediate acts of y first adm^t are void -

A repeal on Citation is only a Revocation of y former
letters of adm^t, but don't affect y original Sentence,
It operates only upon y authority of y first adm^t.
but a County Sentence on an appeal acts directly
on y Sentence repealed from, wh is suspended by
y appeal itself and after a Reversal considered as if
it never has existed. In y former case, y Repeal
merely determines y Trust, it destroys y foundation
of y Trust in y latter case. - it annihilates y first
Sentence.

Note y case in 6. Co 18. B. Ray 224- Whether an appeal
was after an affirmance or Citation -

And if y first adm^r in y last case had obtained
Judgmt vs a Debtor of y deceased, before y appeal, y Deb
may be relieved vs it by "audita Querela" 1. Com 254.
1. Bac 198. Sand 149. 1. Mod 32. or 62. 2. Bac. 412. 2. Ell
688. 10. Mod. 21. 387. So if y Debtor is taken in Est
on y Judgmt, he may be discharged on Motion—

When y adm^r first granted is from "ab Initio" void, all
acts done under it are void, in whatever manner it may
be set aside or Impeached. as adm^r granted by Incompetent
authority as by y bishop of a Wrong Diocese—1. Falk 38.

Agreeably to y Rules, yt a Repeal on Citation, don't make
void intermediate acts, it has been decided, yt if one
dies Intestate and a will is forged and proved as
his Will and y Probate is afterwards revoked, on
Citation and adm^r granted, all lawful acts done under
52. y Probate, (i.e. such as a rightful might do) remain Good.
As a Debtor who paid y supposed Est ant obliged
to pay y same debt to y rightful adm^r (3 Ell. 125)
for y payment was under y Sanction of a Ct of Justice
viz Probate, wh ant affected by y appeal on Citation,
ante 51. Tol 77. Aliter where payment is made under
Probate of a supposed Will of a Living Person, for y
Ordinary cd not have Jurisdiction in such Cases. Tol 77.
3 Ell. 130. But y Rule yt after a Repeal on Citation, all
lawful acts, (ut supra) remain good." applies only to
a case of actual Intestacy, not where y Deceased left
a Valid Will, 1. Com. 262— 2. Bac. 411—

For if y deceased has left an Est, but y Ordinary not
knowing y fact, grants adm^r and y Est afterwards proves
y Will, he shall avoid all Mesne acts done by y adm^r
2. Bac 411. 1. F. haw 411. 1. Com 238. 264. Ploud. 277. 80—
2. Lev 188— 2. under 100—2. 1. Bent 303. for y Est had an
interest, wh y Ordinary cd not deprive him of
besides y Ordinary has no authority to grant adm^r

for he can grant it only upon a Dying Intestate's
 & adm^r itself therefore is void.

So if y deceased left 2. wills of wh y former was revoked,
 by y latter and y Ex of y former proves it. Yet on y Probate
 of y Second, by y rightful Ex^r, all y Mesne acts of y first Ex^r
 are void. 2. Bac. 411. Rolle 918. Com Re. 152. J. Buller
 and Grose deny y^s Rule, 3 V R 130. 1. and cited 2. Greenl.
 90. 1. Ser 158. Were there ^{not} 2. last Ex, Ex of Intestacy?
 2. Bac. 411. 2.

When y first adm^r is repealed on citation, y authority of
 y first adm^r ceases on y Repeal and he is liable for
 all y assets in his hands, to y rightful adm^r as also
 for all unlawful acts, 2. Bac. 412. 2. Saun. 137. 1. Com 264.
 But his lawful acts, pending y citation, as well as
 before are good. Payment of Just debts &c. 1. Palk 38.
 5. Co 18. D.

The effect of an adm^r being void "ab initio" or of its
 being made so, by a Repeal, or on an appeal, is, y^t in
 y former case all y acts of y first adm^r, are considered,
 and may be treated as y acts of a Stranger - as he
 may be Sued as a Trespasser. 2. Bac 411. Flow. 273. 1. Com. 264.
 338. 2. and 150. Yet in y latter case, if y adm^r has
 paid debts, legacies, or funeral Expenses, wh y rightful
 Ex^r ought to have paid. y adm^r shall recover y amt
 so paid, in damages, & shall retain or be allowed so
 much in mitigation of damages. 2. Bac 411. Flow. 273. 1. Ch
 Co 126. 1. Vent 349. St 338. So y^t as to y Question of y
 adm^r's liability, y grant of adm^r is, after a Repeal or
 a Repeal, appeal, as if it had never existed. Yet
 acts ^{done} under it, may be taken notice of, for y
 purpose of mitigating damages, when y Ct will instruct
 y Jury to mitigate y damages to y amt of y money paid. &c.

But in these cases, when y administration is originally void or made so, (ut Sup) on an appeal, a voluntary payment of y debts, to y original adm^r, don't discharge y debtor, even tho a release is given. He must pay it over again. 2. Bac. 411. Bole 919. 1. Com 264. 1. bent 349. I Bule contends no y^o Rule, in case of a refusal of adm^r on y Probate of a Will, tho not in case of a Repeal of any kind on a appeal, 3 TR. 130.1. He may recover it back however, but still, it is a hard case, for he may be insolvent.

54. But it has been held, if a Debtor pay money on a Judgment and Est^d, to one who is Est^d De Facto, having a Probate under Seal, he shall never be forced to pay it again - for he was compelled by Law to pay. 2. Bac 411. 26. Ch. 2. in B. R. Mass. where there is a necessity of an "audita Querele" ante 51. 1. Bac. 198. In y^o case, y debtor is compelled to pay. Cowp 160.1.

There is none, it seems, for y debtor's protection, but tis a satis ground of relief, I G. supposes, if y Will in y Judgment, isn't entitled to y att. &c. If after an adm^r granted, a new adm^r is obtained by Fraud, without a Repeal of y First, and y Second adm^r releases, and he's adm^r then, y release is void. 1. Com. 264. 6. Co 19. a. Dyer 339. ^{ex parte} Lure, as to Creditors? 6. Co 16. a -

The Probate of y Will of a deceased person, unrepealed, is conclusive. in all Cts of Justice, as on an Indictment for forging y Will. Tole 76.7. 528. 571. 2. 481. 703. Tack 11.12. ves. In. 298. 1. P. 112ⁿ 388. 548. But in y case of Indictment, y Rule is denied by Ld Ellenb^rd. 1. Phil Phil 247.

Issue on y Probate of a will, is tried by a Jury - Tole 76. 9. Co 31. It isn't a Record -

What acts an Execu^r may do before Probate-

As y Exec^r derives all his interest from y Will y property in y Testator's effects, is fully vested, in him, before Probate - on y death of y Testator - Proving y Will is called a necessary Evi of y Exec^r's right, it don't confer but authenticates his right. Toll 75. 45. 6. 2. Bac 412. 2. Bb. 507. 1. Com 238. Bents 33. Plowd. 280. 1. Role 917. Co Litt 292. Godolph 144. Lowl 173. 1. attes 460. Hence a Plea, yt y Pltff who sues an Exec^r has not proved y Will, is bad, it shd be, yt he ant Exec^r and then it would be necessary for y Pltff to produce y Probate. Holt 31- 2. Bac 396. Salk 3. Pl. 6. This Evi of y Exec^r's right (ie Probate) is necessary, tis said, because on Probate, there there is an Inventory to be Exhibited and other acts to be done, wh are for y benefit of Creditors and Legatees - 2. Bac. 412. Salk 303. Holt 30-

55.

As therefore y Exec^r derives his right from y Will, he may before Probate, do many acts, wh will be valid. Indeed he may perform every act incident to y office. Toll 45. 6. Com. D. adm^r B. 9. Plow. 280. 1. T R. 480. off Exec^r 34. Salk 299- 1. Com 238. 2. Bac 412. 3 Bents 33 or 8. Godolph 144-

But an adm^r can do no valid act, till Letters of admⁿ are granted, for he derives his whole authority from y appointment of y Court. 2. Bac. 412. 2 Bb. 507. Lowl. 2. 173. Skinner 87. Salk 303. By Valid acts, are meant, act affecting y assets or y rights of Claimants - There are different acts wh any person may do.

The Exec^r may before Probate, for Ex - take possession of y Testator's goods, and may enter y heir's house; if he can do it with breaking, and takes securities belonging to y Testator. 2. Bac. 412. Lowl 173. Godolph. 144. Plow. 277. Bents 33. ander 277. Salk 46. off Exec^r 33. But he can't break open

even an Inner door, Example. for he may not break a Chest. Loc. 175.

So he may before Probate, assent to a legacy and y assent is binding. 2. Bac. 412. Vent 34. 49. Toll 46. 1. Com 238. Godd. 144. Park 481. Co Litt 292. and vests y Interest in y Legatee, provide y will is afterwards proved office Est 35.

So he may pay debts and legacies, receive debts and give releases and take ym. 2. Bac. 413. Vent 33. 4. 49. Toll 31. Com. 238. Plow. 281. a. 5. Co 28. a. 9. Co 39. a. Toll 174. Co Litt 292. Toll 46. off. Est. 35.

But if one entitled to adm^r shd receive debts, and give releases before adm^r granted, he might after obtaining adm^r, recover ym again, for y right of action wasnt in him. 5. Co 28. a. He has no authority, till y letters of adm^r are granted. * But if y adm^r shd recover ym a second time, he will have to refund to y debtor.

So an Ex^r may before Probate, sell, give away, or otherwise dispose of y goods of y deceased, 2. Bac 413. Toll 46. off. Est 35. Loul. 174. Vent 34. 5. 49. 1. Com 238. Plow. 280. Secus in case of adm^r, before adm^r granted.

So if a bond of y Testator be conditioned for y payment at a certain day, wh happens after y Testator's death, but before Probate, it must be paid, by y day. As y Ex^r or at C Law. y Penalty is forfeited. 2. Bac. 413. Vent 34. Loul 174. So on y other hand, if y bond was made by y Testator, y Ex^r must pay by y day. Th^t before Probate, or y forfeiture accrues. Loul 174. Now by y St Anne, 4. Penalties are changed, in Cts of Law, on payment in y Ct. of y Principal. Interest and Costs. 2. Bac 413. 3 Bac 691. 2.

A person named an ~~act~~ ~~in the act~~ is said to ^{begin} ~~act~~ What
Probate, a complete ~~act~~ in all purposes, might ^{acts an} ~~act~~ bringing ^{acts an} ~~act~~ may
actions, ^{acts an} ~~act~~ is said to be can't bring actions before Probate. ^{acts an} ~~act~~ before
Tall. 301. 5. Co 28. a. Plowd. 278. Co. 281. a. Toul. 118. Probate.
9. Co 39. a. 10. Co 52. a. Co Litt 292. b. Henter 51.
" Mod 243. 2. Mod 148. Godolph. 145.

But yr last position is incorrect, y rule, as it ought to be expressed, is, yt he can't maintain actions, nor declare Nisi Probatz is obtained. Tole 40.7. Com. D. adm^r B. 9.
off Eccl. 36. 9. C. 38.

But even y^e restriction, is to be taken with two important qualifications. For. 1. it don't apply to all, except to two Cases, viz the actions of Debt and other actions on y^e Testator's Contract, and to such actions for Torts as accrued in y^e lifetime of y^e Testator. Lord 174. Therefore he may before Probate, maintain Trespass. Trover. Replevin, for injuries done to y^e assets after y^e Testator's death, since in y^e case he may swear upon his own profession. 2. Bac 413. 41. Wenter 25. 50. Lord 174. 1. Com. 238. Yelv. 3. 3. 83. 125. 2. Bulw. 268. Salk 802. 7.

For he may in these cases, may maintain an action in his
own individual capacity, without describing himself as Executive-
Gov. 174. 2. Bac. 413. Carth 184. and if he does so, a Probate
of a will is testamentary, and necessary - 2. Bac. 441. 6. Mod 92.
T. Mod. 62. 3. 2. Treb. 568. You may however sue as Executor
and if he does, Probate is necessary -

So he may before Probate have Trust Pass. Trover. &c for assets
wh never came to his actual possession, but wh are taken
or converted after a Testator's death, for a right of possⁿ
is a constructive possession. Tolt 48. Callh 154. But
Quere, how can his right of possession be proved by 2. Tamm.
but by a will? I G. suppose, y^t a rule to be, y^t 47. 2. Ch. Pl.
he may sue before Probate, for Proport ant necessary. 2. Ch. Pl.
but y^t he can't recover without Probate, and so is a Rule. 238. 374. C.

So before Probate, he may disclaim or avow, for rent, when a reversion of a Term for yrs comes to him from y Testator, and rent accrues after y Testator's death, because y rent accrues after y reversion is vested in him. Salk 302. r. Loe 174. 1. Vent 370. 1. Roll 917. 2. Bac. 413. 1. Com 238. ^{See} of y rent accrues, during y Testator's life -

So he may maintain actions, before Probate, in his Individual capacity on contracts made with himself after y Testator's death, or arising by implication. As for money due to y Testator received by another after y death of y Testator. 1. Tole 48. off Est 36. r. 1. Vent 109. 7. VR. 358. 4. Do 277. Ld Ray 435. For y right of action in all such cases, accrues originally to himself, and not derived from y Testator. Tole 48. 2. VR. 477. There as to Implied Contracts - Is not y distinction as suggested *Supra*. of 22?

So before Probate, he may maintain debt &c. on a Sale of y Testator's Goods, by himself, for here y contract is his, not y Testator's. 1. Com. 238. Loe 174. Vent 141. 41. 52. Tole 48. off. Est 36. r.

With respect to acting on y Testator's Contracts, &c. ut *Sup.* It is not true, as laid down. in 5. Co 28. 9. Co 39. yt an Est can't before Probate bring an action even in these cases. It is clearly agreed, yt he may, in these Co, commence an action before Probate. but he cannot maintain y action or declare before Probate, because he must sue as Est and make a Proffert of y letters Testamentary in his declaration. His Writ may bear Teste before Probate. It is said, if he produces his letters testamentary, at y time of declaring, when he must make Proffert. These remove y Impediments "ab initio" 2. Bac. 413. 1. Roll 917. 1. Com. 238. Skin 23. 3. Lev. 38. 1. Vent 370. Ray 481. Coml. 371. Salk 302. 3. 7. For y Probate when granted, has relation to y time of y Testator's death - Tole 75. off Est 49. 5. Co 38. 1. PWR 767. 1. WRD 461. 1. VR. 48. 4. Do 260.

Cocensors

58.

If there are several Cos representing one Testator, they are deemed in Law, but one person. ante. Their Interest is Joint or entire, and indivisible. 2. Bac. 395.
1. Com. 240. Godolph. 134. Tolt 359. et ultra 243. off East 239.
Sheph. 464. Com. & adm^d G. Post 78. 180.

Therefore tis a Gen Rule, y^t y act of one is deemed y act of all. Hence y possession of one is for most purposes, y possession, of all. A Sale or Gift of y assets by one is valid. being regarded as y contract of all. So a release by one of debts, actions, &c is binding. 2. Bac. 295. Tolt 21.
1. Com. 240. Menter 95. Godolph. 134. 1. Rolle 924. Dyer 23. B. Cro Elvi 347. Tolt 359. Com D. B. 12.

So if one of these grants all his interest in y Testator's Term for yrs, to a Stranger, y whole passes. for each has no entire, individual interest 2. Bac. 395. Dyer 23.
b. Godolph. 134. 5. Tolt 21. So if one releases his part, of a debt due to y Testator, Godolph. 134. An Executorship is different from y. Cases of Jt Tenants. for each Exr. is possessed of y whole. - There are no parts or moiety in their possession -

So one cannot grant his interest in y Testator's effects, to his Co^{or}, nothing passes by Grant, y interest will remain as before, for each was possessed of y whole. before. 2. Bac. 395. Godolph. 134.
Ex D. 2.

So an Exr can't have an action of account for 59.
y profits of y Estate vs y others, 1. Com. 89. 240. 1. Rolle 917. 8. or 117. 8. Dyer. 23. 5. Godolph. 134. 5. Talbot 360.
vide free of Dec Infra. It is said, y^t one Exr can compel his Co^{or} to account with him in Chy for a moiety of y effects. 2. Bac. 305. Led 33 But Exrs have a right to plead different Pleas. Godolph. 125. Therefore
125.

a warrant of atty to one to confess Judgmt as all
is ill and y Judgmt will be set aside on motion.
1. Com 240. La 20. . Role 929. 2. Bac. ³³397. La 4. ann. C. 6.
Toll 360. vide 10. Mod. 323. 1. altho 460.

But one of 2. ^{adm^r} can't make a valid release,
nor convey an interest, so as to bind y other. But
both must join. 1. Com. 240. 1. altho 460. Dougl 2. This
rule was olim doubted. Godolts 134. They ant impow-
-ered by their letters of adm^r to act otherwise y n
Society.

There is an exception however, to y last rule where
adm^rs may sue as in their own right. as in Trevelyan
acknowledging on their own possession. Here they are considered
as Principals, not as Representatives. Hence one may
release y right of action. 1. altho 462.

Of one of 2. adm^rs dies, y Power surviving - w. ante
2. Bac. ⁴¹⁶416. . Com. 240. 1. Res 9. 3. altho 559. So
in y case of adm^r ante - 2. Bac 416. 2. Bern 514.
Salk 36. Dougl. 21. Toll 363.

So if y Exrs. are made Residuary Legatees, one
may sue y other in the Spiritual Cts. for a
moiety, for he claims in y character of a Legatee -
Godolts 135. Prenter 79. 2. Bac. 395. 1. 1. 9

General Rule.

00. One executor ant chargeable for y wrong of his
Companion and ant further liable, than for y
apetus yt came to his hands. 2. Bac 395. Godolts
134. Kent 100. Cro Elvi 318.

Yet if all y Exrs join in giving a receipt, for money actually
rec^d by one only, all are liable at Law, to Cred^rs as if they had
all rec^d and each is liable for y whole. 2. Bac 395.
Salk 318.

Secus in Eqty, as to Legatees, tis said, this y rule of Law holds even in Eqty, in favour of Creditors. Tolle 484. Salk 318. 1. P. Wm 241. 1. Eqty Cd. ab. 398. 2. Bern 370. 3. Bac. ab. 31. in not) and Quere an y same Rule aint hold in favour of Legatees? Tolle 484. 2. Br Chy 117. 1. P. Wm 243. n. 1. do 81. P. Chy 173. 3. Atkes 682 Amb. 218. 2. Br. Chan 116. If a receipt is given by Co-trustees y receiver only is subjected in Eqty, for all must join to make y receipt effectual. Tolle 485. 7. Ves Br. 186. 11. Ves. In. 323. 4. Salk 318.

If an action be brot vs one Ex^r, a plea yt another is Co-ex^r, without averring yt y latter has administered, is, ill, for if y Ex^r has not administered, y Pl^t aint bound to know yt he is Ex^r. 2. Bac. 396. 1. Lev. 167. 1. Sid 242. vide Pl^{da} -

But if one Ex^r sues alone, tis satis for y Def^t to plead, yt there is another Ex^r, without averring yt he has administered. because y fact aint supposed to be within his Cognizance. 2. Bac. 396. 381. n. In actions by Ex^{rs}, all must join, tho' one has not proved y will or is within age. or has refused before y Ordinar^y. 1. Saund. 291. 3. 9. C. 37. Yelv. 130. 1. 1. Bent 95. Salk 3.

If an action is brot vs one of several Ex^{rs} and he 61. does plead, y mistake is an abatement, he loses y y advantage of it. 2. Bacon. 396. Carth 5. arg.^d So if one of 2. sues alone, tis pleadable in abatement only. Saund. 291. 9. Yelv. 130.

If in case of Ex^{rs}, one refuses to accept or prosecute, yet he must be named. Salk 307. 9. C. 37. Godolp 134. ante. and there must be a Summons and a Severance - The object of Summons and Severance, is, to prevent

y Est not acting, from releasing, The effect of y
 Summons &c is to take away his Privilege to y Suit
 and make him no party. 2. Bac. 396. y. 2. Rolle 38.
 Ventr 96. 104. Co Litt 139. Cro Elvi 652. Mutton 123.

But if a trespass is committed on y goods of y Testator,
 while in possession of one of several Est, he alone
 may sue for it. Godolph. 934. Ventr 104. 2. Bac 397
 n. for here he need not sue as Est, but may count
 on his one sole possession. Duer. Holden Contra. 3 Leon
 209. 2. Bac 462. but y is say, so only so far as they
 act, or are are treated as Est.

Executor De Son Tort.

An Est De Son Tort. or an Est of his own wrong,
 is a person who without authority, from y deceased, or y
 Ordinary, does such acts, as belong only to y office of
 Est or admr. Tolle 364. 8. 37. Post 137. 2. Bac 287. 2. Bb. 507.
 Ventr 171. 2. Godolph 30. 1 Corn. 260. Lowl 51. 27 B. 99.
 Toller 37.

62. In general any unlawful intermeddling with y assets,
 of y deceased, will make a Stranger an Est De Son Tort.
 2. Bb. 507. Tolle 37. 8. off Est 171. 5 Co 33. b. 34. Ventr 171.
 As Taking possession of assets, and converting ym to
 his own use, paying debts out of y assets, receiving and
 owing for debts due to y deceased, and in Gen all acts
 of acquiring, transferring or possessing y assets. 2. Bac. 387.
 n. Rolle 918. Dyar 105. 157. Rob 49. Co 33. b. 34. a. The value
 of y assets taken &c ant material. 2. Bac. 390. Dyar
 156. B. 27 B. 100. Milking cows is satis. Tolle 38. 2.
 7 B. 100. May 69.

So paying legacies out of y assets, taking a Specific
 Legacies without y Ests consent, Tolle 38. Godolph 91.
 or answering as Est to any action brot as him, as

By pleading, when sued as Est to any action but no
 him, as by pleading, when sued as Est any other plea,
 on the Unques Est, for by any other he admits Est. 2. Bac
 387. Godolph. 91. 2. Vole 38. Bent 174. 1. Roll 918. 1. Com. 264. 5.
 So a widow of a deceased becomes an Est De Son Tort.
 by taking more apparet yn is convenient for her degree.
 2. Bac. 387. 1. Roll 918. 1. Com 265. Dyer 166. B. If one
 Stranger takes possession of assets, I deliver you to another
 & latter is also "De Son Tort" 2 V B. 97.

By St 43. Elvi, if admⁿ of a goods of a Pntestate is
 given by fraud to an Insolvent, who gives a release
 by fraud of a debt, a Releasee is an Est De Son Tort.
 2. Bac 387. 8. 1. Com. 265. Cro Elvi 405. 802. If one not
 being a rightful Est or admⁿ intermeddles with a assets—
 even in pursuance of directions from a deceased, he is an
 Est De Son Tort. 2 V B. 97. Toller 39.

Seems a testator might defraud, all his creditors by giving
 gifts during his life.

So a Fraudulent Gift by a deceased himself will make 63.
 one an Est De Son Tort. * as Feeding, taking care of a deceased's
 cattle, Paying a debts of a deceased with one's own money, repairing
 a buildings, when suffering for want of Repair, providing
 necessaries for a children, these being acts of charity.
 2. Bac. 388. 1. Com. 265. Godolph 94. 2 V B 507. Lord St.

* A stranger
 man do
 some act
 and not
 be Est De
 Son Tort, as

So defraying a General Expenses out of a assets.
 Vole 40. 368. off Est 174. 4. Ves. Sen 216.

So taking a effects under a claim of Property, in a
 claim is merely colourable, — a mere artifice. 1. Com. 264. Dyer
 166. B. For he don't undertake to act as Est De, but
 only asserts a right in his individual capacity. 1. Root 104.
 He has a right to assert his right to property, wh he
 thinks to be his.

Intermeddling with Real Estate, don't make one Exr
De Son Tort. (Ibid) for an Exr as such has no concern
with Real Estate.

What acts are satis to make an Exr 'De Son Tort' is a
question of Law. Toll. 41. 2 J.R. 99. The rule or at least
y true principle of discrimination, is y, if y act of y stranger
is such, as fairly warrants y influence, ^{or} he claims,
y management and disposal of y assets as Representative of
y deceased, he is an Exr De Son Tort. otherwise not.
In y first case, y act is such, as belongs to y office
of Exr Jc, 2. Bac. 388. Mo 126. 2 J.R. 166. B, in y latter,
not so.

64
54.

Whether these acts have been done is a Question
of Fact

The foregoing rules as to what acts, make an Exr De Son
Tort. apply in y full extent, only to y, where at y time
of y act done, there is no rightful Exr or adm^r, ~~to~~ to those
where there was not any, at y time of y intermeddling, Toll
Toll 40. for after y Probate of a Will, or after y Exr has
otherwise administered, or after adm^r granted, common acts
of Intermeddling, as taking possession, &c. unless embezzling,
converting, will not make one an "Exr De Son Tort"

For there is a rightful Exr Jc, and y goods taken after
Probate, are assets in his hands. Toll 40. 2. Bac 388.

3 Co 33. 6. 34. a. Talk 313. Pl. 10. J. 289. 380.

and y wrong doer is liable as a Tresspasser to y Exeutor,
ante. Talk. 302. J. 2. Bac 403. 441. but not to Creditors.

But his liability to y Exr is not y^t of an Exr, is not
y^t of an Exr but of a Tortfeasor.

But if even after Probate, one not only intermeddles,
but claims to be an Exr Jc, he is, chargeable as an Exr
'De Son Tort' 2. Bac 388. 5 Co 34. a. Talk 313. 5 N.B. 344.
and it seems from Talk 313. y^t y^t claim may be

inferred from certain acts, so as to subject him from certain acts, such as receiving and paying debts, appointing and paying legacies, &c. And not from common acts of Intermeddling, but such as are in y^e Nature of Common Trespasses. Tole 40.

By assuming as in y^e former case, to be Ex^r, he precludes, from denying y^t he is such. + This Rule or Dictum in Tolk goes farther yⁿ y^e other books.

If y^e Intermeddling is before Probate, &c or in case of Intestacy before admⁿ granted, y^e Stranger intermeddling is an Ex^r is an Ex^r "De Son Tort" And y^e act is nothing more yⁿ taking possession. 2. Bac. 388. and he is liable as such to Creditors, w^h he delivers over y^e Goods, to y^e rightful Ex^r, before action is bro^t vs him by a Creditor, but he isn't exempted by such delivery afterwards - 2. Bac. 388. 5 Co 33. B. Tolk 297. 313. 1. Tole 918. Cro Elv 565. Tolk. 49. Tole 367. 3 Tolk. 587. 2. H B B. 28. 26.

The ground on w^h an Ex^r "De Son Tort" is liable to Creditors, is, y^t from their acts, creditors have cause to presume, y^t they are legal representatives; and they have no right to disprove y^e presumption, w^h their own wrongful acts have raised. 2. Tolk 99. 2. Bb. 507. 12. Mod 441. But he has no interest in y^e assets, and cannot maintain an action, as Ex^r Tole 243. 12 Mod 472. 2. Bb. 507. Tole 366. 65.

An Ex^r De Son Tort, is liable to all y^e trouble of Executors, w^hit any of its profits. 2. Bb. 507. He is liable to be sued by a Creditor to y^e deceased, 366. Tole. 20 243. but he can't sue as such. 2. Bb. 507. He can't retain for a debt due to himself, as other Ex^r (Ibid. 1105) not even w^h creditors of an Inferior degree. 2. Bb. 378. 9. 390. 5 Co 30. Tho 527. Tole 522. Cro Elv 630. 12. Mod 441. 471. 1. Com 266. Tole 137. 2 Mod 61. But if he pays debts, with his own money, he may retain to y^e amt paid. 1 Com 266. 1. Tolk 776.

So if after an intermeddling, he obtains letters of admⁿ, he may retain for his own. . . Com 266. 2. Vent 180. Ser 237. Ser 1106. 1. Role 923. Cro Ch 104. as no creditor, of an equal or inferior degree. for y letters of admⁿ in relation, surges y wrong to most purposes, and to y same extent, vest in him y same interest and rights wth other admⁿ have. Toll 244. 12. Mod 471. 2. 2 Vent 179. 3 Yl 546. 2 HC 186. 26.

66. A Rule apparently Contrary to y Last, is, y^t an Executor "De Son Tort" after taking letters of admⁿ, may be charged as Ex^r "De Son Tort" for y^t he shall not discharge himself by any thing "Ex post Facto" 2 Bac 391. Cro Elr 102. 365. 565. 810. 3 Leon 198. But y^e means nothing, it seems, yⁿ y^t after admⁿ obtained, he may be described in a Suit vs him as Ex^r and y^t he cannot, and y^t he can't for being thus described, abate the writ. as to other purposes, y wrong is surged. 2 Bac. 391. ut. ante 65.

An Ex^r De Son Tort is liable, as far as he has assets, to y rightful Ex^r or admⁿ - to all creditors of y deceased & to Legacies. 1. Com 266. Vent 257. Carth 104. 3 Co 30. Yl 42. 1. Role 919. 2. Bac 391. Lool 57. Toll 473. Com D. admⁿ C. 1. off Ex^r 177. 5 Co 31.

When sued by y rightful Ex^r as such, he is described and charged not as Ex^r but as a stranger. As a common Trespasser &c, 2 Boon 388. Carth 109. 4 Salk 296. 1. Vent 349. 1. Com. 266. Ser 384. 2 Bac 378. But if an admⁿ or Ex^r is creditor to y deceased, he may bring debt vs y Ex^r "De Son Tort" with y assent, y^t of y assets, none came to his hands, 2. Bac 378. Salk 304. 1 Role 945. Ser 384. For y Ex^r then stands in y same situation, as any other Creditor. He stands in y place of Creditor, and not Ex^r

In actions by Creditor, he is named and charged, as Executor generally. 2. Buls. 507. 5 Co 31. a. Yelv. 137. 1. Mod 208. Went 254. 5. Com. 261. Tole 473. Com. D. adn^r C. 1. For he is treated in such cases, as an actual Executor.

Generally he liable, only to extent of y assets received, and as no creditor he is allowed all paymt, made to other creditors, in equal or Superior degrees. he may Plead "Plene administravit" and give such paymt in Evi to support y Issue. 2. Buls. 507. 8. Moor 327. 5 Co 30. B. Went 180.1. Carth 104. Tole 364. off. Ex^r 181. 1. Sid 76.

But as no rightful Ex^r be, as in trespass or Trover, he can't by pleading such paymt, bar y action, y Plea of such action is therefore ill. Yet on y Gen Issue, he shall recover, 1st. be allowed in mitigation of damages, y amt of such paymts, in there is a deficiency of assets. So y rightful Ex^r would thus be prevented from retaining for his own debts, or from preferring one Creditor of equal rank to another. 2. Buls. 507. 8. 12 Mod 441. 471. Went 614. 179. 181. Tolin 274. 5 Co 30. B. Carth 104. 2. Bac 390.1. St. 1. Went 348. 350. 2. HC Bul 23.

These lawful acts however, bind y property thus disposed of no rightful Ex^r be, The Ex^r De Son Tort, is generally chargeable to y amt only of assets received. (ut Sup) Yet if he pleads, he brings Ex^r to an action by a Creditor, he is liable for y whole demand, for false pleading. 1. Com 266. Went 257. 2. Bac 390 May 69. Cro Eliz 472.

It is however, in these Cases, y when y value of y assets rec^d is very trifling. y Ex^r De Son Tort may be relieved in Equity. 2. Bac 390. 2. Bern 147. 8. If he pleads, in y case, "Plene administravit" he shall not be charged beyond y assets received. 1. Com. 266. Dyer 165. B.

68. If there be a rightful Exr and an "Exr De Son Tort"
They may be sued jointly or Severally. 1. Com 265. Montro
255. Secus in y case of a rightful adm^r, for an Exr and
Adm^r can't be joined in actions. Indeed they can't exist
"quoad y same ap^{ts}. Tole 473 off. Ex 178.

At Law. y Exr and adm^r of an Exr De Son Tort were
not liable to Creditors tho they were in Chy. 1. Com 265.
2. Mod. 233. Now by St 36. Ch. 2. and 4 and 5. Will and
Mary. They are liable at Law to Creditors, 2. Bac. 391. n.
Tol 57. + Burns Eccl. L. 191. Talbot 474. Com. & adm^r &
S. 3. or 31.

An Exr "De Son Tort" is mentioned in, Enrol to Book,
The Estate P. yet it seems doubtful, an in common cases,
such a character can exist in Court.

What Things belong to them -

69. The whole Personal Estate of y deceased, in general, vests
in y Exr on y death of y Testator as it does in y administrator
on y grant of Letters of adm^r. It vests in y last case
on y grant. De but from y Intestates death by Relation.
Tol 133. 153. Com. & adm^r - B. 1. 10. 1. Co Lite 206. 3 Bac
37. 2. Roll 554.

His interest however is temporary and qualified, he takes
"in Ander Troit" in right of y deceased, in y nature of a
Trustee, interested only with custody and distribution of y
Property. Tol 134. Plowd 182. off. Exr 85.

Hence, he can't forfeit it by his own crime. Tol 134.
2. Bac. 177.

nor is it liable for its ^{his} own debts, ni he has made it
his own by conversion, or consents to its being taken, wh is
virtually an alienation or assignment of it. Tol 134. 1. 6 PM 319.
3. Burn. 1968. 1. also 168. Com. & adm^r B. 10. 1. Bat P. 293.

4 J R. 621. 5 m. 632. off. Ex 86. In both of n^o cases, he is accountable for it,

Nor can he bequeath y interest, tho y Ex^r may transmit y trust to his own Ex^r or rather y trust devolves on y latter. 2. Bac. 385. 6. Tole 135. Plow. 525. off. Ex^r 86.

The effects in y hands of y Ex^r &c are called "assets" ge- sufficient, from y French "avoir" to make him chargeable to Creditors, Leguees or those entitled to distribution Tole 137. Property exempt or privileged, ant "assets" as "Paraphernalia"

These consist of not only Chattels Personal, but Chattels Real, as Terms for yrs. Mortgages, Estates, by H^o Merchant &c, Tole 139. 2. Bac 386. 3. Bac. 378. 4. Co 68. 1. off Ex^r 534. Cro James 371.

So of such crops growing on y land, of y deceased at y as are reared by Manual labour, tho affixed to y Soil at his death, as Corn. Roots. Plants. Hops. Flax. & Hemp. &c. They are called Emblements. Tole 150. 194. 2. Bac 122. 3. off. Ex^r 59. 4 Burn Eccl Law. 200. Com. D. goods. G. Co L. 55. 13. But if y land is devised, y devisee has y emblements - as he by y rule stands in y place of y Ex^r. Talbot 203. 2. Bull 428. Galt. Eri 248. Tole. 132. Is not y reason, yt he takes as a purchaser?

So of common garden vegetables, as Mellons. Parsnips Carrots. Tole 150. 194. 2. Bac. 123. 1. Roll 728. Co L. 55. 13. Contra as to roots. off Ex^r 62. 3. Galt Eri 249. Upon y principle yt they cant be severed, w^out disturbing y Soil. off Ex^r 62. 3. Galt. 249. I G says this wrong.

So of all Personal Chattels in General, as Goods. Money. Furniture. Cloaths. Pictures. Tole 150. 1. 2 Bac 387. 9. off. Ex 57.

So of money. (Stocks) in public funds. Tole 151.

So of an annuity for y Grantor's life. Tulk. 179. Com.
D. Biers. C. 1. 1. Bes 402.

So of Manure is a Mass 12 not spread on y land.
Toll 150. 11. Ben 175.

The Exr has also y Lien created upon y Person of y
Debtor by arrest, on y testator's Exr - it being a pledge
to secure personal property. Toll 151. off. Exr 55. 2. Bl 403.
Carlk 395. Salk 557. La Ray 147. So of an interest in
a negro Slave of y Testator's. but interest seems to be
rather in y Personal Service, ym in y body or person of
y Slave. Toll 151. 2. Bl 403. Carlk 395. La Ray 407. Salk 557.

In general however an Exr has no claim to y service
of a mere Servant, as an apprentice. The master's
death discharges him Toll 152. off. Exr 55. 1115. 1225.
Long 70. 2 Bes 35. 1. Bl 427. 8. The contract being
fiduciary, "Master and Servant"

71. An Exr^{de} has by de Law, an interest in y Testator's Personal
literary property - as in a Copyright. So in y Testator's
Patent right to an Invention Toll 152. 3. It is referred
to there -

But in y property wh y Testator holds in trust for
a third person. as bond to a in trust for B; it don't
rest in d Exr d's right being fiduciary. Toll 153-
4. Salk 79.

Nor is a Pawn to be deemed assets of y Pawnee, till
y day of redemption is past - Toll 154. 2. Bl 395. 5.
Shp 498. For life Men, it's redeemable at Law -

The Exr^{de} is entitled to y Choses in action of y deceased,
an by Recor. Specialty or Simple Contract. Toll 157.
off Ex 55. Com. D. adm. 13.

So by St 4th Edw. III. C.7. he is entitled to damages for a Trespass on y Testator's goods - in his lifetime, and by y C.7. & y C. for y conversion of y m, Tole 108. Com. & B. adm^t 13. Vol. Est. 168. & for cutting his growing corn - or for damages to his close by cattle - Toller 158. bent 187. Post 125.

For y further cases, see "Covenant Broken." 26. Tole 158. Lark 168. Com. & B. adm^t B. 13. Covenant Broken. 1.1. Ventris 176. 347. 2. Ter 26. off. Est 60.

So to damages vs y Sheriff for an Escape on y testator's Est. Tole 159. Com. & B. adm^t B. 14. Post 126.

So in General for any wrong, by wch y Testator's Personal Estate has been impaired in his lifetime. Tole 154. Post 126.

So in all such cases as above. when y Cause of action accrues after y testator's death. Tole 160.1. off. Est 82. Plow 72 286. 2. 2. Wm 468.7.

Action for Injuries to y person of y testator, as for battery, Libel, & maim in such is "Actio personalis mortui cum persona" Tole 160. Lark 188.9. Post 127.

So for an injury to y inheritance of y testator, &c. in his lifetime, as for cutting his trees. graf. &c. Talbot 180. 1. Ventris 187. off. Est 68. Post 127.

Causes of action accruing before y death of y Testator, are not "Per se apertis" tho' y debt or damages when collected are. Tole 162. Rob 66. Cro. Ch 43. Tolk 207.

But not so before collection, ni y Est y Est has released or converted ym or in some way made ym his own. Toller 162. Tolk 207. Shep 497. for they are of no intrinsic value and may not be or productive -

Chattels so annexed to y Freehold, as to be deemed parcel of it, do not regularly go to y Exr, they belong to y heir of y Testator Tole 176. 2. BB 427. 5.

Thus Rent accruing after y Lessor's death on a lease by y Tenant in Fee simple, belongs to his heir. It being incident to y Reversion, which is a Freehold Tole 176. 2. BB. 427. Co Litt 47. n. 9. Cro Ch 207. 2 Tanna 307. 1. Rent 148. 161. Gray. 213. 2. Lev. 13.

So in Eqty of y money converted by y Testator, to be laid out in land. Tole 181. 8. 2. (B) 172. 6. 292. 3. (P) 221. n. C. 2. Eqty Co. 298. Vide Powers of App.

Personal Chattels called "Herloom" go not to y Exr but to y heir. These are Chattels, which are regarded as limits or appendages of y Inheritance. Tole 192. 5. 2. BB. 427. Co Litt 388. In its nature, tis a Chattel but by Custom passes to y heir.

As Deer in Park. Rabbits in a Warren. Doves in a Dove house. Bees in a hive. Fishes in a private pond. Co Litt 8. Co D. Beins B. 1. Tole 1910. off Exr 53. B.

Aliter If y Testator, whose property they were, had only a lease for y^{rs} in y land. - his interest being only Personal in such cases. Tole 193. 141. 8. Co Litt m. 10. off Exr 53. 2. BB. 293. (* It would go to his Personal representatives for his interest in ym was Personal.

Trees of all kinds, growing, fruits hanging upon ym at y Testator's death - and growing grass belong to y heir. being part of y Freehold. Tole 193. Com Digest Beins 7 off Exr 50. I 333. 5)

So of hedges, & bushes, for y same reason. Tole 193. off Exr 50.

So of things sown, or planted by Testator, which yield

no annual profit, as y seeds of Trees, or Young Trees.
These are elapsed with y Emblements Toll 149. 5 Bl. 122.3.
Com. & Benis. G. 1. Co Litch 55. 6. Gill Eri 249.

But trees growing on another's land and brought by
y Testator, go y Est. So if y Testator has sold his land
reserving y trees, - as to y interest in ym, they are
severed forever from y Freehold, in both Co. Toll 155.
off Ex. 59. 60. As a owns trees, B y land on wh they
stand - they are severed - as considered) Such things, Chalks
in themselves, as are strongly affixed to y Freehold - and
cannot be severed without dismembering or damaging it,
belong to y heir - as Fixed Chimney Pies Pieces - Tables -
Pumps - Coppers - Post Rails, Windows, Window Shutter -
doors, locks, Keys, Millstones, anvils, Toll 155. 7. 2. Bl.
428. 7. 12. Mod. 520. off Est 62. 4. Co 63. 4. 4. Burn. Eccl
L 255.

So of Pictures and looking glasses - if put up instead 74.
of Wainscot. Toll 147. 2. Ben 55. 58.

As between y Lessor and Lessee, any thing annexed by y
latter, for y purposes of his Trade, he may sever during his
interest, if he can do so, without injuring y Freehold -
Caliter not - nor at any rate after y determination
of his Interest. as a Turnover for dying - not affixed to
y realty. Toll 158. off. Est 55. 1. Alth 427. Salk 358.

As a modern policy has favoured y right of severing generally,
so y whatever chattels, tho annexed, can be severed without
injuring to y Fabric of y House, or soil of y Freehold - now go
in general to y Lessee's Est. Toll 158. mod. 113. 2. Co 141.
As tables fixed to y floor, grates, Iron Stoves, Clock Cases,
however annexed to y Freehold, have by more recent cases,
been held as belong to y Est. Toll. 158. 4 Burn. & L. 257.

So of hangingd. Substr. beds fastened, to y Ceiling, and
even backs to Chimneys. Tole 108. 4 Burn. C. 2. 207. 5.
2. 2. To 1141. after App. 3. P. 1100 94.

So in favour of trade, of brewing vessels. Vats for Dyers,
Coppers. Furnaces, fixed to y Threshold. Cedar Mills, on y
Land. Tole 108. Talk 302. Tole 34. 1. after 47. 3 after 4.
This is a late case and largely considered.
But ancient Portraits of former owners, of a house, tho
not fastened to y walls, a Monument, or Tombstone in a church,
y Coat armour of an ancestor go y heir. Tole 199. 2. 106.
429. Co Lide 18. B. 12. C. 105.

So of a Pew in a Church by immemorial usage -
Tole 199. 200. 12. C. 105. 2. 106. 429.

75 ~~Est~~ are sometimes entitled to a contingent or Executory
interest, limited to y Testator. As a Legacy to A. to be paid
when he is of full age - and he dies under y age -
his ~~Est~~ will take it. Tole 171. 300. Cart. 52. Com. D. Ch.
3. y. 8. 8. Chancel. Re. 112. 2. Bent 342. 66. 2. Bern 109.

So of legacies to him generally Tole 167. 8. 11. Bern 135. aliter
if it had been bequeathed to him at 21. As if he attained
he so full age - being a contingent or condition precedent -
Tole 171. Com. Chan. 3. y. 8. Com Re. 719. 2. Bent 342.

Lease to A for Life, remainder to his ~~Est~~ for y^{rs}, his
~~Est~~ will take y remainder, tho' not vested in A, Tole
166. off. ~~Est~~ 83. Tenth. 371. on. Re.

So of y Opening of a Testator's cattle, produced post his
death. So of y wool of y Sheep. so produced Tole 166. off ~~Est~~
83.

Chattels Real or Personal given to a Corporation, Cole-
go to y ~~Est~~ he not to his Successor, y successor being
Quasi. an heir. Tole 201. 2. Com. D. Biers. Franchises

F. 16. 4 Co 65. Co Liti 9. a. and taking only Real property.
So if given expressly to such Corporation and his Successors,
it can't go in succession in such case. Tole 212. 1.

1. Rule 5/5. from y nature of y Property - 'for nothing but
reality can go in succession -

To of an obligation to such Corporation and his successors -
Tole 202. 4 Co 65. 3. Pl. 430. 1. Dyer 48. 2 -

But these rules don't apply to a Corporation aggregate -
for it never dies. (not like y case of Testator & Executor,
or ancestor and heir). It has no representatives. Personal or
Real. Tole 201. 4 Co 65. Co L. 9. a. Com Dig Biers. C.
Fornhuys G. 15. 16.

For what chattels go to y widow or surviving husband
of y deceased. see Hus and Wife. Tole 212. 233.

A "Donatio causa mortis" goes ^{not} to y Exor or heir. but to y
Donee. Tole 233.

When one in his last illness, and under y apprehension of
approaching death, delivers or causes, to be delivered, to or for
another, y possession of any personal Chattel, to be retained
as y Donee, on y event or y event of y Donor's death.
y Gift is "donatio causa mortis" Tole 234. 2. Pl. 514.
Dre Ch. 267. 9. 1. P. Mm 404. Ex. a. making -

In every such gift, there is an implied ^{condition}, y if y Donor
recovers y property, shall revert to him. It is a defeasible
Gift; but may be rendered absolute by y death of y Donor.
or ~~Exor~~. (I don't know wh G M)

Such a Gift may even at Law, be made to y Donor's
wife, as y property don't absolutely vest, till y Donor's
death. Tole 233. 1. P. Mm 441. 3. P. Mm 355. and y relation
of husband and wife has ceased.

There must be an actual delivery or what y Law deems,

such in y donee's lifetime, otherwise y gift is incomplete as other mere Gifts by Deed are. The possⁿ must therefore be transferred to y donee, during y donor's or he can't hold Tole 233.4. 2. Bes. 431. 1. P.M. 404. 41. 2. Bes. In 111. This may be done by y donor in person, or by another acting under y donor's order or request. It.
It wd be in y nature of a Legacy in this case.

But when actual delivery is impossible, if all y^t is possible towards delivery is done, tis satis. As in y Case of a ship at sea, delivery of y bill of Sale is satis. Tole 234. 2. Bes. In. 120. vide Bailment and Trover.

* So of what is sometimes, called a Symbolical delivery. as key of a warehouse containing bulky articles, thus given - In y last case, y key isn't regarded, strictly, speaking as a Symbol or Representative but rather as a means of possessing y property. Tole 234. 2. Bes. 443. or 434.

So of y delivery of y key of a Trunk containing y effects given. Tole 234. Pre Chy. 300. 2. Bes. 441. 3. 2. Bes. In. 45.

A Bond may be y subject of such a donation, y property being conveyed by y delivery. Tole 234. 3. Bes. 214. 2. Bes. 441. 4. Br. Ch. 52.

47. So of Banknotes, being considered and treated as Cash. Tole 234. 5. 1. P.M. 404. 3. Do. 358. 2. Bro. Chy. 612.

Aliter it, seems of Bill Exc. Promiss. Notes. Cheques. They being regarded as only Evid of simple Contracts. Tole 235. P.M. 356. 2. Bes. 442. 4 Br Ch. 291.

It.
A Symbolical delivery is y delivery of a thing as y representation of another. The delivery of y key in y above case, is only y means of obtaining possessⁿ.

So of Simple Contract debts gen. and arrear of Rents Tole. 236. 2. Bes. 436. 441. Gifts of y kind isn't objects of

sense. Inalienable.

A delivery merely Symbolical is not satis. as a Dispence delivered as a Symbol on a gift of other property. Tole 235. 2. Bes. 440. 431. For it ant a delivery of y Property itself or of y Means of Possessing it.

Still less a Gift by bare words. Tole 235. 2. Bes. 444. 2. Bes. In. 120. There must be either an actual or one in contemplation of Law. A Personal absolute Gift can't agree as a donation of y kind, as it takes effect in Presenti. Tole 235. 2. Bes In 120. 111. 4 Br Chy 285. 2. Bes 436.

Aliter of a draft on a Banker, endorsed yt it was for y Donee's Mourning. Tole 235. 1. P. M. 441. 2. Bes In 111.

Whether y delivery of a mortgage deed, may amt to a "Donatio Causa mortis" of y mortgage money seems to be an undecided point. - it being only collateral Security. Tole 235. 3. P. M. 358. n. 2. Bes. 436. amb. 313. D. G. says it does not.

A Gift of y kind becomes absolute on y Donor's death. Tole 235. 1. P. M. 441. 3. Dr 357.

It need not therefore be proved as part of y Donor's will and y Ex^r assent to it, ant necessary. Tole 235. 2. Bb. 514. 2. Bes. In. 120.

But it will not prevail on a deficiency of assets - as y Cred^{ts} Tole 237. 2. Bb 514. 2. Bes. In. 120. They take it, as they would an absolute Gift.

An Ex^r De. may make y effects of y Testator De. 12 y beneficial interest in ym., his own or they may become so. by consequence by coming into his hands. Thus ready money left by y Testator, on coming into y Ex^r hands becomes as to y Property in y Specific coin, altered

*. and if y property can't be found, P. G. thinks y Donee may be treated as an "Ex^r De. Son Tort"

as it cannot from its nature and form be distinguished from his own. Vol 238. off. Exr 88. It is not y reason, y^t he is not bound, nor is he to retain y specific money, as Assets. since y money of y same amt, is deemed to be of precisely of y same value. Hence y Testator's creditor cannot take it on Exr as "Done Testator's" Vol 238. off. Exr 88. "Fraudulent Conveyances." 36 Title by Execution 8. 4. It has no earmark says La Holt.

So if y Exr be advances his own money in case of Assets, he may seize any of y specific assets of y Testator as a compensation, thus making ym his own, provided it is taken at an adequate price. Vol 238. off. Exr 88. Dy 187. in Plowd 180.

And if a debt due from y Testator to y Exr amounts to y full value of y assets, they become his own by operation of Law, for can't take ym by himself of Law, as he can't give himself. Vol 239 95. Plow. 18. 180.
(our Law is y Eng Rule of Eqr no priority here)

So if he pays rent with his own money, on y Testator's lease, y profits of y Lease & y amt of y rent are his own. Vol 239. off. Exr 91.1.

So if he y, as he may, y testator's effects, sold on an Exr, they are his own. Vol 239. off. Exr 91.

If there are several Exrs y^e they are regarded as one Individual, they have a joint, entire, indivisible interest in y assets. wh interest on y death of one results to y Survivors. Vol 234. off. Exr 259. Shep L. 464. Com. D. adm^r G. ante 58.

79

As to priority of debts, see 2. Pl 51. off. Exr 133. Vol 258. As to y Exr right to retain a debt due to himself from y Testator. 2. Pl 51. 3 Pl. 18. 9. off. Exr 32. 142. 8.

Legacy.

A Legacy is a bequest or Gift of Personal property by Will and all persons are capable of being legates with some Special Exceptions at Law. and by Fe. Title 293. 2. Pl. 512. 4. 4 Bums & L. 313.

Those who can take personal property by other modes of conveyance generally by will. - A Feme Covert may take as Legatee from her husband. 1. Pl. 442. n. Co Litt 112. Title 300. for a legacy don't take effect, till a ^{coverture} legacy is determined by the husband's death.

A Child in " ventre Sa Mere" may be a Legatee being in Use, for yt and most other purposes. Title 300. .. P. 117. 342. 1. Res. 115. 3 Br Chy 320.

80. Legacies are of 2. kinds. General & Specific. 2. Pl. 542. The former term expresses such as are either Pecuniary or such as are denominated by Quantity. Title 300. as Request of a certain sum of money, with further description or such a proportion of a Testator's effects. or of such a weight or measure of certain property.

Specific are of 2. kinds. No. 1. where a bequest is of a certain Chattel. in particular and so described as to be distinguished from all others. as such a cow. ring. or horse. 3 Br Ch 113. Title 301.

Sec² Where a chattel of a certain Species, is bequeathed without distinguishing any one in particular of yt species. as I give a horse or a ring. Ibid. The first can be satisfied by a delivering of a Identical subject, & latter may be satisfied by delivering any Chattel of y same kind. Title 301. 2. Tonb. 374. n. 1 asks 416. amb 37

A legacy of a given sum as of 50 £. is a general pecuniary legacy. 1. Res. 364. Title 301.

Cts are generally reluctant to construe legacies as Specific. Yet if y intention is clearly to give a Specific Legacy - it must take effect as Such - Amb. 300. Tole 301.

And even a Pecuniary Legacy may under circumstances, be Specific as. 100 £ in such a trunk. or in y hands of A. Tole 301. 2. 1. atk 508. Br Chy 100. 1. P. Wm 100. 15 Res. In 384. & or such a box or chest

81. So of a bequest of a debt due from B. on account or of an debt due by such a bond. or of y Testator's stock in such a fund. Tole 302. 330 Amb. 318. 1. P. Wm 303. 1 Res 425. 1. Eqty & Abr. 298. 3 P. Wm 384. 2 Bro Chy ~~380~~ 125. 113. 4. 2. P. Wm 330. Amb. 506. for it is distinguished by y description from all other effects, & makes it Specific.

So if y bequest is of all y Testator's personal property in y town of A. Pre Chy 392. Tole 302. 2 Res 688. 2 Tonbl 376. The Reason is y same.

So of y bequest of $\frac{1}{2}$ of y debt due from A. or of a certain part of his stock. in a particular fund. 3 atk 103. Tole 302. 2. Res 503. Tonbl 374. 1. P. Wm 540. n.

On y other hand a mere bequest of Quantity, an of money or any other chattel - is a General Legacy. as 100 £ in cash. or 100 bushels of corn. 1. P. Wm 540. n. 1 atk 414. 2. Res 502.

If y Testator bequeath so much stock and have so much at his death, y bequest amounts to a direction to y Exr to procure so much - for y Legatee. Tole 303. Tabb 227.

Personal annuities given by Will, are also General Legacies. Tole 303. 3. atk 593. 2. Res 417. 2. Tonbl 378. Tid Res 133. as 100 £ per annum. for 10 yrs granted to B. and B. bequeath to A.

A Legacy of 50. £ Sterling vested in such a company is a
General Legacy. 3ves In. 384. Cole 303. 303.

82.

Legacies are vested or lapsed, this a General Rule, yet if a
Legatee dies before y Testator, y legacy lapses or sinks
into y Residuum, i.e. y part undisposed of by any Special
bequest. 1. P.M. 83. 3. Porro Ch. 142. Cole 304.

To find it be given to a and his Ex^{ors} and a administrators
or assigns — for y Ex^{ors} &c ed take only from a. 2. Br Ch. 224.
Cole 304.

To find y Testator shd express an intention, yet a Legacy
shd not lapse on y legatee's dying first. 3 after 372. Cole 304.
for it cannot vest, when y Legatee is not in being —

But if y will provides, yet in case of a's dying first,
y bequest shd go to another, y latter contingent bequest
will take effect as is a shall die &c to B. or to a's
legal representative. Cole 304. 3 Br Ch. 224. 17. Res In. 374,
3 after 372. 580. 2. Bern 378. 207. 2. P.M. 331. 3. Do 113. See Ch. 37.
1. P.M. 204.

If given to two or more, it don't lapse by y death of
one of ym. living y Testator, but y whole will vest in
y surviving Legatee. Cole 304. 2. after 220. 2. P.M. 331.
(For at y testator's death, it is in fact a Legacy to him)

But if y residuum be given to two as Tenants in Common —
and one of ym dies before y Testator, his moiety lapses.
Cole 343. 1. P.M. 1700. 2. P.M. 379. 529. wd not y
will be y same, were not y bequest residuary? For y
interests bequeathed are Several.

And a legacy to a Sole Legatee don't lapse by his
dying before y Testator, if he is to take in y character of
Trustee: for y interest ant intended for him. Cole 304.
1. Res 140. 2. Bern 468. 2. Cont. 369. m. 1. et h. Chy will

supply a Monitor, if necessary. * And it not lapse on
Certain Due Trust so dying?

83. But a legacy will lapse, if given on condition. 1. If y Legatee die before y condition is performed, or if he die, before it is vested in interest. 2. Jomb. 308. Tole 305.

If a Legacy is left to a payable at a certain age, it is vested and transmissible, being "debitum in Praesenti" solvendum in futuro: aliter if y Legacy be given to him at such an age, or if or when he attains such an age - In these Cases it don't vest, until or unless he attains such an age - Jolier 171. 2. 305. 2. Bern. 347. 1. Do 462. 3 P 117m 138. 1. Bern 193. 199. 2. Do 342. Fath 415. 1. P. Chy 119. Post 86.

A Legacy whether General or Special or Specifick, creates only an inchoate interest, to render it complete, y assent of y Exr is necessary, y legal Title being in y Exr Tole 306. 2. Pre Chy 512. Co Litt 111. 2. altho 498. 3. Do 240. 1. P 117m 554. 2. Do 645. For there may be a deficiency of assets for y payment of debts. If y assets prove deficient, y assets y legacies must abate or entirely fail,kata y extent of y deficiency, and if y Exr pays legacies, when y assets are deficient, he becomes responsible for y debts "pro tanto" Hence y necessity of assent to y completion of y Legatee's title. off Exr 27. & Tole 307. This assent when given, is Ev of assets, and amounts to an admission on his part yt y assets are sufficient for y satisfaction of higher Claims. 2. Off. 512.

If y therefore y Legatee takes possess of y thing bequeathed without assent, y Exr may have Trespass vs him - Tole 307. off. Exr 27. 23. Jyer 254. 3 alth 240. Even a Specific Legatee.

84. The rule is y same, tho y testator shd in his will, have authorized y Legatee to take y property on his

y Testator's death. If it were otherwise, y testator might by such directions, defeat all y Creditors. off. Ex 223. Tole 307.

Yet before y Ex^{or} assent, y legatee has such an interest in y thing bequeathed, yt if he die, before it is paid, it shall go to his representatives. For y interest, tho' only Equitable, may be vested as well as if it were legal, off. Ex^{or} 289. Tole 307. 8. (an Equitable interest, as a legal one may be bequeathed.

If a Testator by will release a debt due to him from B^y, it seems, yt y assent of y Ex^{or} is necessary to give effect to y testator's intention: For such a testamentary Release is in y nature of a legacy, and can't take effect, unless there are assets for y payment of debts. Tole 308. off. Ex^{or} 29. 30. 2. P. Wm. 332. 1. & 83. 3. altho 380. Post 94.

There is no prescribed form for assenting to a Legacy, y assent may be Express, or implied - Absolute or Conditional and a slight manifestation of y assent is satis. 1. Bern. 94, 460. Tole 308. 2. Bent 308.

This assent may be inferred from words or acts of y Ex^{or} - as if y Ex^{or} congratulate y Legatee on his legacy, or requests y Legatee to dispose of it. Tole 309. off. Ex^{or} 226. Shek. 455. 2. Bent 308. Com. D. adm^r 6. Post 98.

So if y Ex^{or} purpoves to purchase y Legacy of y Legatee, or advises another to purchase, so to purchase it. Tole 309. off. Ex^{or} 226. Com. D. adm^r C. 5. Shek 455.

So if a lease is bequeathed to A. for life, remainder to B. an assent to A's interest will operate as such to B's Tole 309. Com. D. adm^r C. 5. 10. Co. 47. B. 3. P. Wm 12. for both limitations constitute but one estate. Com D. 85. adm^r C. 5. off. Ex^{or} 285. Tole 303. 9.

To e converso, if y assent had been to B's remainder, for same reason. Ibid

And an assent to a legacy of a Term is an assent to any condition or contingency annexed to it. As a bequest of a Term to a widow, while unmarried, and if she marries, of a certain rent out of y same. Here assent to y devise of y Term, extends to y Rent, in case of her marriage - Tole 301. 1. Role 620. Com. & adm^r C.O.

The assent may be absolute or conditional, but y condition if any, must be precedent. As Devise of a Term. Assent if y devisee will pay y rent in arrears at y testator's death. The state of y Assets may require such a condition. Tole 310. off. Ex^r 238. Com. & adm^r C. &.

But a condition subsequent wd be void, for if y Ex^r once parts with y Legacy, he cannot clog it with restrictions subsequent. This wd make y Interest conditional wh y Testator gave absolutely. Tole 311. off. Ex^r 238. Com. & adm^r C. &.

The assent has relation to y testator's death and will confirm an intermediate transfer of y property in interest rather by y Legatee. Tole 311. off. Ex^r 246. 50.

Assent before Probate, is good, if y will is eventually proved. Tole 312. 45. off. Ex^r 35.

86. In general an Ex^r is allowed a year, from y Testator's death, for y paymt of Legacies, as he must have some time to ascertain y debts and y state of y assets. The Law therefore has established a positive period. Tole 312. Tolk 415.

So, of distributive Shares in cases of Intestacy. Ibid.

If a bequest is made to one, payable at y age of 21, it is vested. But to be paid in future. 5 Re. 443. Tolk.

171. 305. 325. ante. 83) In y^e case if y^e Legatee dies, before
y^e age, his Exec will be entitled to it, when he would
have attained full age, if he had lived so long, but
not before, nor made payable with Interest. Tolle 171.
305. 13. 25. Carth 52. Com. & Ch. 3. T. 2. Bern 342. 66.
2. & 199. 2. Jon M. 371. At R. 1 Bern. 462. 2. 9th 171. 138.
Poro Chy 119.

If payable with interest in y^e meantime, y^e legatee's
representatives are entitled to y^e whole on his death.
12. P. G. concludes. y^e if a year from y^e Testator's death
has elapsed. For in such case, it appears, y^e a benefit
accruing before y^e age of 21. was intended. Tolle 171.
305. 313. 25. Str 238. 480. amb 588. 1. Bern 307. 1. Br Chy 305.
313. 105. 3 Bern 32 10. 2 Bern 118. &c. It was delayed
from prudential motives, he might not have discretion.

But if given to one at y^e age of 21. or if he shall
attain y^e age, and y^e Legatee dies, at an earlier age -
his lapse and y^e legatee's Exec have no title to it
Tolle 171. or 117. 313. 305. 2 Bern. 342. Com & Ch. 3.
19. 3. ante. 83.

But if limited over in y^e last case to B. he will
take immediately on C's death. For he does claim
under A. This is a distinct substantive bequest to A. B.
Tolle 313. 25. 1. Equity Co. 299. 300. 2. 9th 171. 478. 86. B.

As to y^e general distinction between y^e effect of precedent
and subsequent condition, vide Title. Contracts.
Roper. 42.

If a condition Precedent, which is originally impossible,
be annexed to a legacy, y^e legacy must by y^e C Law
fail. * Roper 43. Co Litt 205. Shaw. P. C. 837.

So if a Precedent condition becomes impossible by act
of God, or of y^e testator, or if it is unlawful or

to y bequest. By y Civil Law, y condition only in all y above cases is void, y legacy is good, Roper 43. and by y C Law if such conditions are subsequent, y legacy is absolute, as in Contracts. "For being vested, such conditions don't divest or defeat ym. Roper. 43. Co Litt 205. B.

Roper on Legacies.

A condition yt y Legatee shall not dispute y will, is considered "in terrore". So that if there is probable cause of contesting y will, an attempt to set aside, don't forfeit y Legacy. Roper 43. 2. Bern 90. 1. alk 404. 3 P.M. 344. 1. Brooch 168. 1. Br Sig 168.

Aliter if y legacy is limited over, on breach of y condition, For y rights of a third person are involved in y case. Roper 49. 49. 2 P.M. 526.

All conditions in restraint of marriage are by y Civil Law void (Roper 50) and Cts of Eqty having a concurrent Jurisdiction of Personal Legacies with y Ecclesiastical Cts) have so far conformed to y Rule as to treat all cond^{ns} 86. restraining marriage ^{gen} as void, and y Legacy absolute.

As yt y Legatee shall not marry or not witht y consent of others, and y Rule holds, an y condition is subsequent or Precedent. But when y condition requires marriage with consent of y marriage witht or with consent must take place, to vest y legacy. Roper 50. 1. 3 alks 330. 350. 507. 1. Mills 130. 1. alks 500. 3 do 574. 514.

But a condition restraining marriage as to time, place, or person, are valid as not to marry before 21. or not to marry in such a place or such a person, or to marry a particular person, if of good character. Roper 51. 4. Br P.C. 194. 1. Bern 20. Roper 57.

And a condition restraining y Widow of y Testator from

marriage at all, is valid, because of y interest, her family may have in her remaining single. Roper 51. Goddard 45. C y effect is sometimes ruinous to y family in point of property.

But in case of conditions restraining y legatee's marriage generally, where y Legatee ant y Testator's widow) if y legacy is given over, y Ct of Chy holds y condition valid. So noncompliance is a forfeiture. Roper 52. 2. Bern 307. ~~342. 52.~~ 452. 2. atkes 616. 1. Br Chy 303. 2. do 431. Contra 2. atkes. 184. Rule of y Civil Law Contra. Roper 52. So yt y Residue, (not y particular legacy) is thus given over.

Roper 55. 1. Eqty C. 112. 2. Br Chy 431. 463. Contra 2 Bern. 293. 3 atkes 364.

But y Rules making conditions in restraint of marriage void, hold only in cases in which y Ecclesiastical Cts have Jurisdiction i.e. cases involving rights to Personalty only. Hence when legacies are charged on Real Estate. Chy gives full effect to such conditions, whether there is a limitation over or not, in clearly unreasonable. Roper 55. 6. 1. atkes 381. 3 Br 330. 1. Mod 300. 9. 8.

In General y Est has no right to pay a legacy to y Father or Guardian of an Infant Legatee, without y sanction of a Ct of Eqty. If so paid, it's not at y risk of y Est. Tolle 314. 1. Ch. Cases 245. 2. Br Chy 84. 186. 1. Eqty C 300. 4 Burn Eccles Law. 321. 1. Q. 71^m 285. 2. atkes 81.

But where a bequest was of 100 £ to B. to be equally divided between himself and y Family, he having Infant children, payment of y whole to him was held valid, as being authorized by y Terms of y bequest Tolle 317. 3. Br Chy 95.

So if a legacy to an Infant is too small to warrant an application to Chy, payment is y Infant or his Father,

or his father, it seems, is valid. Tole 318. 2. asks 81.
Com & Ch. 3. G. 6. 2. Bro Chy 613. J. Exr 219. 20.

If an Exr has by y will a General power, to divide
a bequest among several children at his ^{discretion} children, an
obvious unreasonable division, may be controlled in Eqty.
Toll 319. Bern 355. 66. 2. Bern 515. 13. 2. bes 640. Talbot
72. or y Ct may settle y original division, in such Cases.
319. Tole 320. Com & Ch. 2. W 11. 2. Bern 421.

Still y Exr having such a power, may make a valid
division, tho y shares differ in amt, if each share is
a substantial part and not merely nominal. Colourable.
Toll 320. 1. bes 57. 2. Do 640. 1. T. R. 432. 5. bes. Pn. 149.
7. Do 124. 9. Do 382. Eqty wont interpose, ni y division
is clearly unjust.

88. And even a trifling proportion allotted to one of y Legatees
will not invalidate y Division, if he has been guilty
of Gross misbehaviour. Ibid.

A Legacy to a feme covert must be paid to her husband,
in his by operation of Law. Toller 320. 1. Bern 261. 2. B
Ecc Law. 332. Hus Wife Art 2. to 63. If paid to her
and she embezzles it, y Exr must pay again to y Hus
tho she were living separate, and without a separate main-
tenance And if paid to her, y Exr may be compelled
to pay it over again to y husband, without Interest. Ibid.
Hus Wife. Art 2. P. 62. 3.

So if they were divorced a "Mensa et Thoro" for y relation
of hus and wife ant dissolved, Tole 320. 1. 1. Role 340.
2. Role 301. Cro E 308. Talbot 115. Ld Ray 13.
and y husband can release it. Ibid.

How far a Ct of Eqty in case of legacy to a wife,
will by way of imposing terms, or otherwise oblige
y husband to make a reasonable provision for y wife

see *Yus and Wife* no 2. 63. *Tole* 320. 490. 2. *P. Wm* 639.
 3. *Do* 11. 202. 2. *atks* 67. 2. *P. Wm* 641. 2. *bern* 60. But see
 2. *bern* 579. & *Des. In.* 517. 737. 2. *Des. In.* 676. 10. *Des. In.*
 5178.

Ademption

The ademption of a Legacy is y taking away or revocation
 of it by y Testator. *Tole* 329. and may be Express or Implied.
Ibid. 1. *Tomb.* 353 Express is by a revocation in terms. 89.
 It may be implied from acts of y Testator, as where
 after a provision for y Testator's child, by Will, he
 gives to such a child, a marriage portion, or a sum
 of money as advancement provided y portion is equal to y
 Legacy, y presumption in such a case, is, yt 2 portions for
 y same child were not intended. The one is deemed
 a Substitute for y other. *Tole* 329. 2. *Tomb.* 354. n. a. 1. *P. Wm*
 680. 2. *bern* 113. 257. *P. Chy* 183. 2. *atks* 214 amb 325.
 2. *Br Chy* 307. *P. Chy* 81.

After if a bequest is residuary. for in yt case all y
 other objects of y Testator's bounty are provided for.
 and y bequest cannot defeat or qualify or at all
 affect any other disposition in y Will. In y case
 there is no such presumption as above. *Tole* 329. 30. 2. *atks*
 216. or if y provision in y Testator's lifetime is subject
 to a contingency - for it may be defeated. *Tole* 330. 2. *atks* 49.
 & or advancement.

Or if y provision and legacy are of y same kind, or
 "Eiusdem Generis" For then there is no presumption, yt one
 was meant as a substitute for y other - as y one consisting
 of Realty, y other of Personal property. *Tole* 330. 1. *Br Chy*
 425.

Or if y portion was ~~not~~ given absolutely and y legacy
 under qualifications. For y same reasons. *Tole* 330. 3. *Br Chy*
 192. Or if y Testator were a stranger to y Legatee, no
 such presumption. *Tole* 330. 2. *atks* 516. 2. *Br Chy* 498.

"The latter gift don'ts adempt."

And y presumption of an intention to adeem. may always be rebutted by Evi to y Contrary. Yalb. 310. 2. Atk 515. 2. Por Chy 593. This rebutting an Equity - see Pow Chy.

But annexing a C. deuil, after an advancement or portion to a child. tho' it confirms and ratifies y will, in Yerms, don't rebel y presumption, these being but words of Form. Toller 330. 2. Green 224.

91. On Questions of 'ademption, - y Testator's intention must Govern. But on y question, what amounts to Evi. of such intents, authorities are not all reconcilable Tole 335.

† If a General Legacy is bequeathed, out of a particular fund, y subsequent use of y money by y Testator, it is said, is not an ademption and y sum is to be paid out of y General assets. as £100. payable out of such a fund. Tole 336. 1. 2. Por Chy 108. Bray 335. 1. P Wm 477. Contra 3. Por Chy 431. 2. Fonbl 36. n. f. vide Amb. 401. Where if y following rules are correct, is not y one wrong? B G thinks it may be

But tis agreed. yd where y bequest is of a Specific Chattel, and y Testator alters y form of it, so as to vary it from y description in y will, y bequest is adeemed. The interest is presumed to be changed. as a gold chain into a Cup. Wool into Cloath. Cloath into Garments. Tole 332. 3 Por Ch 110.

So if a bequest is of Bank stock, and y Testator post sales. Tole 338. 3 Por Chy 108.

Aliter if after selling y stock, he buys in again y same quantity. answering y same description and dies. The presumption first raised is then refuted. Salk 333. Salk 226.

If part of y stock bequeathed, is afterwards sold by y Testator. it is an Exemption "pro tanto" Tole 333. Sale 226.

So if a debt is bequeathed, y Testator receives a Dividend upon y Debtor's bankruptcy. Tole 334. 2. Br Chy 108.

Legacies may be Cumulative

Legacies may be cumulative 18. y legatee may be 91. entitled to 2 or more different legacies under y same will. As of y kind are contradistinguished from those in wch a bequeathing clause is repeated. Tho only one request is intended. On y point, y Testator's intention must govern. Tole 334. 1. Br Chy 389. 2. Do. 387. 527.

Tole 334.

When y same specific thing is bequeathed to y same person twice in y same will or in a will and again in a Codicil. y legacy ant cumulative. For y same thing cannot be given at y same time to y same person. More y once. Tole 335 1. Br Chy 322.3 or 392.3

So when y same quantity of any thing, bequeathed twice by y same Instrument. Tole 335. 1. Br Chy 392. n. Do 30. n. 1. P Wm 424.

Also if unequal quantities are given in different parts of y same instrument as First. 100 £ then 200 £. These are Cumulative Tole 335. 1. Br Chy 392. n. 2. Do 521.

So when equal or unequal quantities are bequeathed to one person, by different instruments. Tole 335. 1. Br Chy 391. 2. n. 1. P Wm 423. As different Instruments disposing of different parts, and a legacy given to y same person in Each. These distinctions are founded on y supposed intention of y Testator Testator.

These wd not be accumulative, if both bequests appeared, from y Will, to be for y same cause, and given by y same

or by different instruments, as where a particular cause or reason is assigned for both and is y same in both Cases. Tole 336. 1. Br Chy 392. n.

nor where a second Codicil appears to be only a Copy of a former one, with an additional Legacy. Tolt. 336. 1. Plow. 423. 423.

Aliter where one is given generally and y other for some express purpose, or where one reason is assigned for y first and another for y second. Ibid.

So if both are not "Ejusdem Generis" as if one is of a sum in Gross. and y other of an annuity. Tole 336. These are different in their effect - 1. P. M^{re} 428. 17. Beson 462.

And Extrinsic Evi is admissible as to y Testator's intention, yt y Legatee shd take both or only one. Tole 336. 2. Br Chy 527. 8. 1. P. M^{re} 424. There on what's honest I say y Parol Evi may be admitted, to show yt y Intention was to give both, but to prove yt he was not intended, to take both, he can't any reason why Parol Evi shd be admitted. Per some Cases, a Legacy by a debtor to his Creditor is regarded an intended satisfaction of y debt, in other not. In y^d point y Testator's intention must also govern. Tole 336. 7. Salk 150. 5. 2. Donbl. 332.

Generally it is said, a legacy thus given, if it is equal to or greater yⁿ y debt, is considered as a satisfaction of it. Tole 337. 1. P. M^{re} 409. n. 2. Chy 394. 2. P. M^{re} 132. 8. 3. Do 353. 1. Bes 126. 2. P. M^{re} 555.

This is a rule of construction but in many cases it don't apply. Tole 337. 1. P. M^{re} 409. n.

As where there is an Express direction in y Will, for y payment of y Testator's debts. Tolle 337. 1. P. Wm 410. Salk 66. 8. 1. P. Wm 409. n.

So if less ym y debt y legacy dont go, even in diminution of it. Tolle 377. Salk 518. 2. Bern 477. 8. 2. P. Wm 616. (In y case it dont apply to y debt at all.)

So if y legacy is conditional and given on a Contingency, an intent to pay y debt, will be presumed. Tolle 337. 2. Fonth 331. Pre Chy 394. Salk 508. 2. after 300. 491. 2. P. Wm 555. 1. bes. 510. (Secus it wd be to presume y debt payable on a contingency.)

So if y bequest appear not to be equally beneficial with y debt in some ^{one} respect, And it may be so, or more so in some other, as Where y amt is greater, but time of payment later. Tolle 337. 8. Pre Chy 236. 2. Bern 478. 2. after 300. 1. Pre Chy 125. 295. 2. Fonth 331. n. 2. bes. 635. 2. P. Wm 409. n. 324. 2. P. Wm 614.

So if y debt was due on an open running account, & balance was not ascertained. Tolle 238. 1. P. Wm 299. n. so expressed in y Will.

So if y Will was made before y debt was contracted It wd not have been in y Testator's contemplation. Tolle 338. 2. Fonth. 303. 2. Salk 508. 1. P. Wm 409. 2. P. Wm 343. 3 & 353.

And y Parol declaration of y Testator at y time and even subsequent to making y Will, may be proved to rebut y presumption of an intended satisfaction, And y Will itself shd afford Evi of such intention. Tolle 338. 11. bes. 542. 3 & Wm 354. see Evi and Power of Chg. as to revoking an Eqty.

But a legacy to a Creditor, will in all cases be 94

considered as a satisfaction, or at least will be applied to y debt, if there is a deficiency of assets. If not others wd be injuriously postponed. Yoll 338.

Wherever it is deemed a satisfaction, it draws interest from y Testator's death. Yoll 338. 3. atts 99. This ^{not act of} ~~an~~ county but an act of Justice

When given to a debtor of y Testator, y debt shall be deducted from y legacy or go in full satisfaction, as y case may require. For y Legatee is considered in Eqty as having already in hands so much of y Testator's effects, as y debt amts to, and of course is satisfied "pro tanto" Yoll 338. 2. P. 11m 128.

If a Testator bequeaths to a debtor his debt, this in effect a testamentary release of y debt and operates only as a legacy. It is of course assets for y payment of y Testator's debts. Yoll 338. 38. 2. P. 11m 332. 3 atts 558. o. off. Eccl 29.30. 1. P. 11m 83. So yt if y assets are deficient, y debt must be paid in part or in full, as y case may - according to y extent of y deficiency.

Abatement

Legacies.

If there are assets sufficient for y debts, only, all y legacies must fail. If satis for y debts and not for all y legacies: The General legacies are first subject to abatement. Yoll 339. Yoll 374. 2. P. 513. The Special legacies only being preferred.

But a sum bequeathed generally, as a recompence for an injury - done by y testator is entitled to y same exemption from abatement ^{as} a Special legacy. Yoll 339. 2. P. 513.

Some other General Legacies are entitled in Eqty to y same exemption. Yoll 340. 1. P. 11m 423. 2. P. 11m 25. (& There is a claim of Justice, that he is not on a footing with Debtor.

95. If one bequeaths a Specific Legacy, wh includes all his property, viz, General Legacies, he be paid out of all his

Personal Estateⁿ The Specific are subject to y General. The more y latter would be singular. Such much must have been y Testator's Intention. Tole 339. 340. For Chy 393. 2. Donbl. 377. 8.

If after certain General Legacies, y Testator adds others from an Expectation of a Surplus over y first. and there is no Surplus, y former shall be paid, to y exclusion of y latter. Tole 340. 2. P. Wm 23.

And in case of a deficiency of assets, for y payment of debts, even Special Legacies must abate. Tole 340. 2. Donbl. 377. n. 9. 2. P. Wm 382. 1. Do 403. 2. Bern 411.

(and they must abate in proportion to y deficiency)

If Specific Personal property bequeathed to two or more in parts. is deficient (or if part is needed for y debts) y Bequests abate among themselves) Tole 340. 2. bes. 863.

Specific Legacies, tho preferred for most purposes, to General, are still liable to Risk, to wch y latter are not. As if a Chattel specially bequeathed is lost or destroyed, y Specific Legatee bears y whole loss, without contribution Tole 340. 1. P. Wm 540. But y Rule ant precedible of General Legacies.

In some cases legacies paid are liable to be refunded in whole or in part, to y extent. Est. as where there is a deficiency of assets for debts. Tole 341. 2. Bb 513. 1. Bern. 94. 2. Bent 350. * wch he didnt know of before.

In y case tis usual for Est to take a bond to 96. refund in case other debts are discovered. of wch he was Ignorant.

If y Fund be insufficient for y legacies only, and one is voluntarily paid by y Est, y other can resort to y Est only, Tole 341. 2. bes 134. 2. Bern. 205. * in he is

re is In solvent, 2. Dec 184, in wh case Eqty will compe
y Legatee paid to refund in part. The reason of y Rule
is, yt by voluntary paymt, y Eqty implicitly admits and y
Law presumes satis apetto. & This Provis. seems reasonable

If y paymt was involuntary, y Eqty ant liable. If
trusts, to y others in case of a deficiency (ni it appear
y fund was originally sufficient) as he was compelled
to pay. Ibid.

But in such cases, 1. & when y paymt was compulsory,
if y original fund is shown to have been deficient,
y Legatee paid, must refund. At y legatee, and y
Legatee ant bound to refund at y suit of y Eqty
ni y paymt was compulsory. Vole 342. 2 Dec 205.
or ni necessary for debt, not known when y legacy
was paid. Vole 342. 1. Chan. Cases 135.

In either of these cases, y legatee paid is compellable to
refund to y Eqty or creditor, as y Eqty in Eqty stands,
in y place of y Creditor Vole 342.

The debts and particular legacies being paid, y residuum
must be paid to y Residuary Legatee, if any. 342. Vole.
2. BC 514. or on his death to his representatives. Vole 342.
Earth 52.

37. In general, y residuum comprehends all lapses of legacies
tho y general right may be limited to a particular residuum
Vole 343. 1. & 11m 362. & when y legatee died before y Executor.

Then there is a surplus of assets, over debts and legacies,
and y residuary legacy fails of effect. y residuum is initial
surplus, and goes to y testator's next of kin, under p. of
distribution. Vole 343. 1. & 11m 400. 2. 20523. Post 101. 2.

If one becometh a Surplus of his Personal Estate, after
 payment of debts and legacies, the Exor^{nt} is bound in
 Equity to plead in a Legation, to debts claimed by a
 in favour of a Residuary Legatee. Tole 243. 1. E. 4. Cases
 300. Pre Chy. 100. 15 bar. 408. Par 124.

It seems however, that Equity would compel him to be paid
 in favour of the Legatee. For if paying a debt, would
 render a assets insufficient for such legacies, a payment
 would defeat a Testator's intent. not so as to rendering
 Legacies, for they must have been regarded, & intended
 as Contingent. 12. 12 Specific or General Legatee.

In General. Specific and Gen Legatee, are liable
 to abatement of their bequest, in favour of Residuary
 Legatee. Tole 344. 1. Pre Chy 478. 1. P. 11^m 300. n. 2.

After this held in case of a deficiency occasioned
 by a "Devastant" In such case, he comes in with other
 legatee "pari passu" Tole 344. 1. P. 11^m 300. o. 2. 1. 2.

Besides there is no reason, why he shd suffer by a
 wrong of a Exor, more than other Legatee.

If a legacy is bequeathed to a Exor, an act of his taking
 it into his possession is deemed to be done by him,
 as Exor and not as Legatee. 12. it is not regarded
 as an assent to a Legacy. His authority as Exor being
 his first and most General authority. Besides all
 a assets may be needed, for claims paramount to a
 Legatee. Tole 344. 13 Co 47. 11. Co 11. 6. 12. 70. Plow 520.
 543. Com. D. adm^r 5. 1. Leon 216. off. Exor 226. (otherwise
 he wd be considered as having paid himself a legacy,
 and wd be liable to pay all others. In strictness, his
 assent to his own legacy, is as necessary as to any
 other. for a last reason. Tole 345. off. Exor 22. 47. Com
 D. adm^r 5. 1. Leon 216. off. 226.

This assent may be Express or Implied. By express words or acts. Tole 340. 1. Lev 25. Com 8. 2d m. C. 6. ante 84. By recognizing a remainder limited, after a interest given to himself. By granting or devising it, with a recital or its having been given him by a Will. By appropriating a benefit of a property or a property itself to his own use. Tole 345. 1. Lev 25. 1. Role 920. 5/9. Comb 1 Leon 216. 1. 2d 25. 27.

To be. Performing a condition or trust annexed to a bequest. To paying a sum required by a condition. Tole 340. Plow. 454. 539.

And an agent to take part of a Residuum, or residuum Legatee, is an agent to take a whole. Tole 345. 2. Role 13. 158.

But if an Exr being Legatee, leases a property by a name of Exr, it amounts only to a claim in a capacity of Exr. Tole 345. 7. 1 Leon 216.

If given expressly for his care and trouble, he must act as Exr or manifest his intention to do so. before he is entitled to it. This is in effect a Condition Precedent to his title, as Legatee.

Tole 347. 3 B. Chy 35. 2. lev 2n. 148. 4. Is 212. 212. 18. Do. 417.

And an Executor being a legatee, has no preference to other legatees of a same class. Tole 347.

The former rules relating to a abatement and refunding of Legacies, hold as well to a Legatee, who is also Exr as to other Legatees. Tole 347. 2. 36. 572. Plow. 545.

To tho' a bequest be in money as a Re-compence. Tole 347. 2. Bern 434. 2. Wm 25.

Testators appointing his Debtor. Exr &c

If a creditor appoints his debtor Exr, y debt is at Law discharged, y right and duty being in y same person. Tole 347. 2. Bl. 511. 2. off. Exr 31. Talk 299. Com. & adm^r B. 5. 8. Co 135. as if y obligor of y bond, appoints y obligor Exr, y s amts to a release of y debt at Law. 8. Co 135.

So, if one of several D^r or D^r and several debtors, is made Exr to y Creditor, all are discharged at Law. for y appointment is a testamentary release, and a release to one, is a release to all. Tole 348. off. Exr 31.

So, if one of several Exrs is indebted solely to y Testator, his debt is discharged at Law. For one Exr can't maintain an action vs another. Their rights are D^r. Tole 348. off. Exr 31. 2. Plow. 264. ante 66. In all these cases, Ety may compel a payment for Creditors. not for legatees. D^r,

The rule is y same, tho' y Exr indebted, has died, without proving y Will or administering, or tho' he sh^d refuse y Trust, or he formally renounces in y proper Ct. Tole 348. Talk 300. 7. 8. Plow. 184. off. Exr 31.

But y appointment of a debtor adm^r to his Creditor, don't release y debt. Such an appointment being an act of Law. wh only suspends y Legal remedy. For tho' y Testator may by his own act, discharge a debt due to himself, y prerogative Ct cannot so do it. by appointing a representative. Hence on an adm^r death, his representatives are liable at Law to y adm^r "De Bonis Non" of y first Intestate. Tole 249. Co Ch. 373. Talk. 302. 1. vent 303. off. Exr 32. 8 Co 135. 1. Sid 79.

So. if an ~~Ex~~ married y Testator's debtor, y marriage is ^{no} a release of y debt. even at Law. - it is only a suspension of y remedy during Coverture, and y adm^r ~~De~~ Bonis Non^r can on her death, enforce y debt at Law. So. if y husband die first, she may. (P. G. trusts), subject his representatives at Law. Tole 349. 1. Leon 320. Mos. 235. Salk 300.

100.

So y appointmt of y debtor as adm^r durante ~~De~~ only suspends y remedy. till y Infant ~~Ex~~ attains y necessary age for action or acting. Tole 349. Sd. Ray 600.

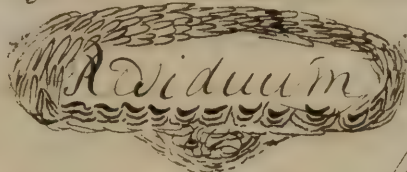
On Eqty. y appointmt of a debtor ~~Ex~~ don't as to Creditors, even suspend y remedy vs y debtor, if there is a deficiency of other assets. This debt is assets in Eqty in such case, for paymt of all y Creditors. Tole 349. Salk 303. 6. off. ~~Ex~~ 31. 2. Bl. 512. Shek. 497. 8. 13. Res. Am 264. Plow. 186. For y appointmt is only in y nature of a voluntary Release, wh ed not in justice be allowed vs Creditors &c. If there is a deficiency of assets, he can't be compelled to pay any more in Eqty yon at Law.

But as to legacies, y release is in General good even in Eqty, for y legal release is in effect a Specific bequest. of y debt of ~~Debtor~~ ~~Ex~~ and he has a right to detain it vs other Legacies. Tole 349. 30. 2. Bl. 512. Co Litt 264. C. 2. 1.

But y rule, also. (tho' y debt is extinguished) admits of Exceptions in Eqty, whenever y presumption of an Intended extinguishment of y debt is rebutted by y terms of y will. Or by clear inference from it. Tole 350. as when a Testator directs a legacy to a blind person, to be paid out of y debt due from y ~~Ex~~, in wh case y debt will be Tole 350. assets in Eqty. for y paymt of all or any of y legacies. yaly 160. as it was clearly intended, not be extinguished.

So if a distinct legacy is given to y Exr in such case 101.
 y debt is assets in Eqty, in favour even of Residuary Legatee,
 or next of Kin. Tole 350. 3 Bro Chy. 110. Sub 240. 4 Br P.C.
 180.

So where it appears from y Will, y Exr intends
 and considers y Exr as a Trustee of his whole Property.
 For tis clear in such cases, yt no beneficial interest was
 intended for y Exr Tole 350. 1. bes Br 17. 1. atk 435.
 460. 3.



As y whole personal estate of y Testator devolves at Law,
 upon y Exr, if after y payment of charges, debts, and legacies
 there be a Surplus, it vests regularly in him. Tole 351.
 1. P. 11m 550. 2. Tenth 131. n. 1. There is no one to claim
 after all y debts &c are satisfied.

He stands in y place of y Residuary Legatee. Tole 352.
 14. bes Br 193. 15. &c 409 409.

But if it appears from y face of y Will, expressly or by
 satis implication, yt no beneficial interest was intended
 to be given him, he will in Eqty be a Trustee for those
 on whom y Law wd have cast y Residue in case of
 Intestacy i.e y Surplus will go as Intestate property.
 (Ibid) as where y Testator styles him an Exr in Trust.
 Here y intention is clear. Tole 352. 1. P. 11m 350.
 n. 1. 2. Bern 90. 2. P. 11m 158. 2 atk 18. 2. Bro Chy 634.
 1. bes Br 63. (+ that is, if there had been no Will.)

Aliter if he is made a Trustee only as to Specific Trust,
 distinct from his office as Exr as to Sale lands of
 y Testator. Tole 352. For such a Trust affords no
 presumption as his right to a beneficial interest in
 y Surplus Personality.

Exrs taking y residue, as Exrs are
 entitled to take it, precisely as Residuary Legatee, if any
 wd take it. Tole 352. 14. bes Br 193. 15. &c 409.

102.

So where a Testator appointed a American Minister, or whoever sh^d be a American Minister at a Testator's death. Es^t, it was held, a^t Es^t was not entitled to a Residuum, not being appointed as a Friend or in his individual capacity, character. but in a capacity of Minister. Gole 352. 7. Res. In 230. 12. Es. 369.

So where a Testator had begun a disposition of a Surplus, but didn't complete it, the Residuary's Legatee's name being omitted. Gole 352. 1. P. Mm 550. n. 1. 2. Res. 81, 85. 2. Res. In 78. 4. Es. 117. 1 P. Mm 549.

So where a will contains a residuary clause, wh^{ch} is erased and illegible Gole 352. 1. P. Mm 549.

So where a Surplus is bequeathed, but a Residuary Legatee dies before a Testator. Gole 352. 1. P. Mm 550. n. 1. Amb 769. 3. Res. Chy 28. ante 97.

So where a legacy is given to a Es^t expressly for his care and trouble. Gole 352. 2. Donlb 131. n. 1. 2. Res. 97. 1. Res. 473. 2. P. Mm 158. 2. Res. 148. 2. atts 48. "Expressio unius est Exclusio alterius" applies.

And a pecuniary legacy bequeathed generally, to a Es^t has been held satis to deprive him of a Residue, it being unreasonable, when a part of a Surplus is expressly given him, to suppose y^t a whole was intended him. Gole 353. 1. P. Mm 350. n. 1. 2. Donlb. 131. n. k. 2. Res. 678. Bumbury 112. 1. P. Mm 144. 3. Es. 40. Res. Chy 107.

A Bequest y^t a whole personal property shall go, kata to Law. will entitle a next of kin to a exclusion of a Es^t Gole 353. 14. Res. In 307. Because this is in effect a gift to those, who wd have taken, had a Es^t died intestate.

A Specific legacy to a Executor will also exclude him from a residuum in favour of a next of kin. Gole 353

2. Verm 425. 3. attes 316. 1. Pr Chy 154. and if there is no meset of kin. a trust will result to y Crown or State. Tolle 353. 1. Pr Chy 201. So tho y legacies are bequeathed to y next of kin. Ibid.

The same rules of exclusion from y Residuum, hold as 103.
y Exr tho she were y wife of y Testator Tolle 354. 1. P
Wm 115. 550. n. 1. 2. Conbl 130. n. Ambler. 125. 2. Eqty C. 444.
1. Pr Chy 154. * Except perhaps when y legacy bequeathed
to her is of Specific property, wh was hers before marriage.
Tolle 353. 4. 2. Conbl. 130. n. P. 7. B P C. 511. 2 Wm 3. 338.
* in y case it is y opinion of some yt the rule not
be concluded — not settled.

In all cases y Exr can be excluded from y Residuum.
in Eqty. he is always intitled to in Law.

But whenever a legacy to an Exr, is consistent
with y intent, yt he shd take y Surplus, a Ct
of Eqty wont deprive him of it. as y Rule of Law is
in his favour. as where a bequest to an Exr is only
an exception out of another Legacy — as if a library be
given to B. out wh y Exr is to select 10 books for
himself. Tolle 354. 3. 1. P. Wm 550. n. 1. Pre Chy 231. 2. Eqty
Cs 444. 2. attes 45. 3. Is 299.

Nor where a legacy is given by a codicil to one of
2. Exrs Tolle 354. 14. bes B. 193. 2. Conbl. 131. n. k.
Pre Chy 363

Nor where y legacy to y Exr is only of a limited
interest for his life. Tolle 354. 2. Conbl. 131. n. k. 1. P. Wm 114.
Pre Chy 316. 1. bes. B. 358.

For in these cases, y legacy is considered as an Exception,
out of a more General one, and ergo don't imply y
absurdity of giving him expressly a part of y Surplus.
when y whole was intended Tolle 354. 1. P. Wm 116. n.

104.

and in general when a equitable presumption will be
 as y Ex^r claim to y Residue, and the a^y declared
 intention is manifest in it, favors to rebut y presumption.
 Tole 355. 2. K. 11. 135. n. k. 2. P. 112. 158. 160. 210. 420. 2 Des
 28. 1 Des 158. It is not manifest to him to have an
 opposite intention (supra (4th))
 see Eve and Pow Ex^r as retaining an Equity.

But not to prove y testator's intention subsequent to y making
 of his Will. Tole 355. n. Will 318. ant 125. 2 Des 158. 405.
 544. 14. Lo. 318. For his intention at y time of making
 y will must govern, nor where an Ex^r is declared
 to be a trustee of y assets, nor where y bequest is
 expressly given for his use. Tole 355. 2. P. 112. 158.
 It would contradict y obvious actual intention, absolutely
 on y face of y Will.

Distribution under the R^o of Disⁿ 22. and 23.

Ch. 2.

In case of Intestacy, y duty of an adm^r as to collecting,
 and managing y effects, making an Inventory, and y pay-
 ment of debts, is y same as an Ex^r. But at y close of y
 term, cease to be y same, there being in y former case
 no rule to direct y subsequent distribution of y property,
 or effects. Tole 369.

Before y R^o of distribution. 22. 23. Ch 2. Ch. 10.

-ables

y adm^r (whom y R^o has been empowered to appoint)
 enjoys y whole residue of y effects, after deducting y Statute
 Partes for y Intestate's widow and children, and paying
 debts. There was no law compelling him to distribute y
 residue. Tole 369. 70. 80. 4. 2. P. 112. 148. 2. 186. 310. 1. Des
 233. ante 20.

105.

This R^o directs y R^o (all debts, funeral charges, and
 expenses being first paid) to make a distribution of y
 residue of y Intestate's effects, i. e. personal property, as follows

II. One Third part to y Intestate's widow and y residue ^(widow and Residue) equally among his children and their representatives; except such children not being heir or heirs at Law, to y Intestate's * as have rec^d from y Intestate in his lifetime any settlement or advancement equal to y respective shares of y other children, or if any child has rec^d such a settlement & which is not equal to each of y other shares, so much is to be distributed to him, as will make his share (including what he has already rec^d) equal to y other children.

* This distinction in favour of y heir at Law, don't obtain in Court, nor probably in y Country. Indeed all y children in Court are equally heirs at Law.

II If no children or representatives of any are left, one moiety goes to y widow and y residue to y Intestate's next of Kin in equal degree and those y present ym-

(Wife but no Residue.)

no representative among collaterals, however, is to reach beyond Sisters and Brother's children. Post 110.

III. If no wife (widow) is left, all y Intestate's personal property is to be distributed among y Testator's children, ~~and~~ if there be no child, among y next of Kin, and in equal degree, and their legal representatives as above.

There is no distribution to be made, till after y Expiration of y year, and every person receiving a share is to give bond, with surety, to refund his notable part, in case of debt, post appearing. Vall 3rd 2.

By y 29. Ch. 2^d Ch. 3. Sec 25. it is provided, y y 106.
proceeding to, shall not extend to y estate of Female Coverts.
dying Intestate 12. y husband and bound to distribute.
Vall 3rd 3. 80. 11th 381.

But for y rules relating to Female Coverts Intestacy, see see New Inf. No. 1. 73. 5.

If a widow & of y Intestate have a widow and children, one third
 Issue and left belongs to y widow, and y residue in equal portions
 to y children and, (if any of ym are dead) to those
 who represent ym. 18. to y Lineal Descendants of y Intestate
 in y remotest degree. Tole 373. 4 Burn's Ecc. Law 358.
 Com D. adm^r & C. C. Raym^d 500. 1. P. 17^m 27.

Child^{ren} all living 1. Suppose all y intestate children living. The rule is
 one third to y Widow, y residue equally among y Child^{ren}
 here is no room for representation. For representation
 obtains only, where one or more of those entitled, are
 nearest of Kin to y Intestate, ym y other, and when y
 latter take in right of their deceased, who were in equal
 degree with y first.

114. Post. A Brother or sister of y half blood, is equally entitled
 with one of y whole blood: being in equal degree of Kin-
 =dred. Tole 374. Com. D. adm^r & C. C. 1. Msd 209. 1. Bent 315.
 2. Lev. 193. 1. Idem 437. 2. Idem 124. Carth 51. (and a
 posthumous child takes equally with those born in y
 Intestate's lifetime. Tole 374. 1. Bes. 156. 2. P. 17^m 446. 2. Atkes
 117. 11. Bes 6th 139. Parent and Child 66.

If there is only one child, and he alone takes y whole
 residue, after y widows share. Tole 374. Carth 52.
 Gkni 212. 9.

So if there be but one claimant (as if there be no
 widow and but one child) he takes y whole. Tole
 374. 4 Burn E & L. 343. 3 P. 17^m 48. n. Pre Chy 41.

107.

(Child^{ren}
 Dead)

Second. suppose all y children dead, having all left
 Issue. as. A (y Propositor) has 3. children D. B. and C.
 They all die. B leaving 2. children, C. leaving 3.
 and D. 4. A dies Intestate. In y case y residue
 after y widows part, goes to all A's grandchildren
 in equal shares. or "per Capita" For they take.

in their own several right (18. per Sturges) (as next of kin to y Intestate. and not by representation) their parents being all dead. If no widow, y whole distributable property wd go in y same way. Tole 375. 1. Eq. C. 249. Pre Chy 54. 1. P. M. 505. 3. Do 50. 2. Bes 213. 1. atk 454. 2. Bb. 218. 517. (i. y Intestate)

If these grandchildren had all died, leaving children, y. latter (i. y Great Grandchildren) of y Intestate, would take in y same way. Ibid.

Third. Suppose, some of y Intestate's children, living ^{Some living} some dead, and others dead, y latter having left children, as A. (y propositus) has 3. sons. B. C. and D. B. dies, leaving 4. children. and C. dies leaving 2. D. survives A who dies Intestate. One third goes to D. (A's son) one 3^d to B's 4. children. y other third to C's 2. For y Grandchildren of A, take as representing their respective Parents. Per Sturges. 18. not in their own right but by representation. So yt y children of each deceased child of y Intestate, take what their parents wd have taken, if living. Tole 375. 2. Bb. 217. 1. Eq. C. 249. Pre Chy 54.

No child, (ni y her at Law.) who has had ^{from} y Intestate, a settlement or advancement equal to y respective shares of y other children, is entitled to any share under y Co. Tole 376. 71. ante 105. ^{advanc^{mt}}

And if one has so reciev^d a portion, not equal in amt to a distributive share, he is entitled to so much as will make it Equal. Tole 371. 5.

This ^{pro} provision however does not divest any such settlement, or portion before given to a child, but if he claims more, he must bring it into "Each Poeh."

18. it must be estimated with y^e Mass of y^e property to be divided. Tole 376. 2. Bams. 443. 9. 4. Burris Eccl. 344. 2. Plb. 190. 517.

But y^e provision as to bringing it into 'Hock Pot' applies only to cases of actual Intestacy. Hence if there is an Exor appointed & declared Trustee for y^e next of Kin, they take y^e residue, as if given to y^m, by y^e Will, and 'Hock Pot' aint required. Tole 376. 14. Ves. Pn 324. 18. y^e children advanced take as much as y^e child not advanced.

Advancement. What.

In Eng. if one purchases an office or military Commission for his son, tis an advancement. 1. Tole 377. 3. P. Wm 317 n. o.

So a provision made for a child, by way of settlement. So this on valuable consideration, as y^e of marriage. Tole 377. 2. P. Wm 440. 4. 2. Vern 638.

So an advancement may consist of an estate in lands, or a charge on lands, as a rent. Tole 377. 2. P. Wm 441.

So this to take effect after y^e Testator's death. As an annuity to commence after his death, or an estate in Reversion. Tole 377. 2. P. Wm 440. 1. 5. 8. For such interests are capable of valuation, and vest during y^e testator's life.

109. And this it depends upon contingency, it will be thus considered - when y^e contingency happens. Tole 377. 8. 2. P. Wm 440. 8. 1. Eqty C 249. 2. Eqty C 445. It being contingent tis capable of valuation, it may be brot into y^e 'Hock Pot' and y^e whole distribution completed at once, it seems, or y^e next may be equally divided, with a conditional order, y^t if y^e contingency happens, y^e portions shall be so

distributed as to make all y ^{eventually} shares ^{equally}. Tole 378. 2.
P Mm 442. 8.

But y contingency must be limited to a reasonable time, or y portion cannot be regarded as an advancement. Tole 387. 2. P Mm 440. 6. 9.

Each Port augments y assets only for y benefit of y children only not advanced. The widow derives no benefit from it. She has her 3^d of y other property, witht including y portion &c. Tole 378. Pre Chy 182.

If a child advanced, die in y Antestate's lifetime, leaving children, they are subject to y clause relating to advancement. Tole 378. 2. P Mm 500.) As they take only in his right, or what he wd have taking, if living.

A Portion or advancement in Personal property, as well as in land &c. is within y clause. Tole 378. Com D. adm^r & H. 4. Burns Ecc Law. 344. 2. Ben 638.

But small sums of money or trivial presents, are not as a wed. wedding cloaths, &c Tole. 380. 3. P Mm 317. 1. bes 16. amb 187. 3 alke 528.

Nor money advanced for y maintenance or education of a child. Tole 380. 3 Bac 76.

Nor in Eng an portion received out of y mother's Estate, it not being within y Eng It of distributions. A rule founded on analgg. to y Custom of Eng. London. Tole 380. 2. P Mm 358. JG says, it dont obtain here.

This rule relates to y case of a widow during Antestate. But dont obtain in Comt. (JG.) as y case is within y It of distributions of y Estate. Husb. Wife. No. 1. 73. 5.

Nor any provisions made for a child by will or devise, when as to part of y Personal property, y Parent dies

Intestate. It is not within y. clause of "Stock pot"
Toll 380. 2. P.M. 440.6.

And no provision is contained ^{an} advancement, in such an
one as devised y. Intestate in his life time, of y.
interest intended to be settled on y. child, and it take
effect in possession, after y. Intestate's death. Toll 380.
2. P.M. 440.

nor is property given to a child by a 3^d person,
nor such as he may have acquired. Toll 380. 1. 3 Bac
46.

Wife, but
no child?

¶ If there be no children or legal representative
of y.m. in existence, one moiety shall go to y. Widow,
and y. other to y. Intestate's next of Kin, in equal degree,
and their representatives, but no representation among
Collaterals shall be admitted further y.n. Brothers, and
Sisters children, &c. y. children (or immediate issue)
of deceased brothers and sisters, to y. Intestate. Toll 382.

The mode of calculating y. degrees of collateral Kindred
is yt of y. Civil Law, viz by counting upwards, from
either of y. parties (y. Intestate or y. Claimant) to y.
Common Stock (i.e. y. first common ancestor in y. ascending
line) and thence downwards to y. other party. — reckoning
one degree, for each person, ascending and descending.
in other words, by taking y. sum of y. degrees, in both
lines to y. Common Ancestor, and yt is y. degree of kindred
between y. parties. Toll 87. 9. 382. 2. P.B. 207. 504. Pre Chy
593 Thus a brother or sister of y. Intestate is related
to him in y. second degree. viz from y. Intestate
upwards to his father in one degree. — thence downwards
to his brother in another, and Uncle is in y. Third and
Nephew in y. same. A Cousin German is in y. Fourth
Tillot 89. 90. 4 Burns Eccl. L. 355.

Under y. words, next of Kindred in equal degree,
y. father (and on his death) y. mother succeed to

to y effects of y Intestate, (if he left no Issue) to y exclusion of his brother and Sisters: and to all y effects, if he left neither Issue nor Widow and so is y Law still in favour of y Father. Tole 382. 2. P. 515. 6. amb. 192.

But by St 1. Pam. 2^d if one after y death of his ^{Stat. 1.} Father, but in y lifetime of his mother, dies Intestate ^{P. II.} without either Wife or children, his mother takes only an equal Share with his brother and Sisters & their Representatives. Tole 382. Salk 251. 1. P. 480. La Ray 684. Com R 95. The reason of y provision is, y^t Secus y mother might by marrying again, transfer y property to another husband, to y exclusion of her own children.

But a Stepmother to y Intestate is not as such entitled to any share, not being of his blood. Tole 383. 2. Plow. 215. affinity won't do."

But if y Intestate leave a mother (a widow) and 1/2. a wife, but no Issue. his brother and sisters, if any, will take equally with his mother, and then there is no brother or Sister, living, yet y immediate Issue, if any of a deceased brother. He will take in y same manner, equally with y Grandmother. 1. alk 437 & Tole 383. 2. P. 344. S.C. 1. Ser 710. 1. alk 455. Gibb Re. 189.

But if there is neither brother nor Sister, nor any immediate Issue of either, y case ant within y St 1. Pam. 2. and y mother is entitled as before y St was made. Tole 383. 4. Burn Eccl L. 374.

In Comm. there is no such provision as y^t in St 1. Pam II.

The clause excluding representatives among Collaterally beyond Brother and sisters, children, relates to Brother

and system of γ Intestate, only and don't admit of repres-
-entation among brother and Sisters, to each other, who
are more immediately related to γ Intestate. Tole 383.
Ray 495. 2. Bern 158. 293. Salk 250. Sd Ray 371. Com
Re 87. 1. P/Mm 25. 595.

This if there an Uncle living and a deceased Uncle's
son, γ latter can take nothing. So if there be a
Cousin German, and children of γ deceased Brother,
or sister, γ children take nothing. Tole 383. 81. Salk
250. Sd Ray 371. Com Re 87. 1 P/Mm 85. So if there
be a Nephew and a deceased Nephew's child, γ latter
takes nothing. Ibid.

So if a deceased Brother of γ Intestate has left children
(next of Kin) and another deceased brother or Sister
had left Grand children, γ Grandchildren take nothing.
Tole 384. Salk 250. 1. Sd Ray 371. 1. P/Mm 75. Com. Re.
87.

13. So γ t representation among Collaterals, extends no
further, γ n γ immediate Issue of γ Intestate's Brother and
Sisters. In all other cases among Collaterals proximity
of Blood alone give Title alone to γ Exclusion of
 γ more Kindred. When γ next of Kin are all
children of deceased Brother and sisters of γ Intestate,
they take in equal shares "per Capita" in their own
respective rights and not as representatives of their
Parents. As if γ Intestate leaves (as next of Kin)
one son of a deceased brother and ten children of
a deceased Sister, or half Sister: the 10. children
take 10. parts of γ 11. parts, and γ only son, γ remaining
part. Tole 384. Soul. 71. 1. Egly Co. 249. Pre Chy 54.
1. P/Mm 505. 3. Sd 50. 2. Ber 213. 1. alk 454. For γ Parents
of all γ children being dead, they all take as next
of Kin in their own right, not by right of Representation.

If γ nearest Kindred are a Grand Father & a Brother or

Sister, y brother takes to y Conclusion of y Grandfather.
 Also in equal degree. Tole 384. Amb. 191. Tole 90. 1.
 This preference is grounded it seems upon y words "pro
 suo cuique Parte" in y St. as entitling y Claimant
 to any preference existing in his favour at C Law, before
 y St was passed: and by y C Law rule of Computation.
 there is but one degree between brother and 2. in
 y other case. Cth wh governs in y descent of Real Property.

But a Grandfather excludes an Uncle or aunt. A
 Grandmother does y same, y former being nearest in degree.
 Tole 384. 5 Tolk 38. 257. 2d Ray 648. Com R 95. 108. 9.
 12. Mod. 615. 2. Ves 213. 1. Bro 41. Com D. adm^r 11.
 11. Prec 527.

A Paternal and Maternal Grandparent will take
 to equality, dignity of blood not being regarded.
 Tole 385. 391. 1 P. Wm 53. Uncles and Aunts. Nephews
 and Nieces, are in equal degree & take equality. Tole
 385. 1. Atk 454.

Kindred of y half blood are equally entitled with
 those of y whole blood, in equal degree. For in
 y distribution of Personal Property under y St.
 proximity & not quantity of blood gives Title.
 "Aliter by y Canons of descent by y C. Law."
 As an Intestate leaves Brothers and Sisters of y half
 and whole blood. They all take equality. Tole
 374. Com. D. adm^r LC. 1. Mod 209. 1. Vent 316. 2 Lev.
 173. 1 Vern 437 2. Do 124. Carth 51. Formerly y half
 blood took only half Shares.

The y St directs yt no distribution be made till after
 a year has elapsed, from y death of y Intestate, yet
 y interest in y several distributive Shares vests
 on his death. Hence if a relative entitled to a Share
 dies, within a year, his share will go to his

his representatives. The parties entitled, being in y nature of Rescuary Legates, constituted by Law. Tole 386. Cuth 51. 2. Camb 14. 112. 2 Show 285. 2 Mod 258. 2. Rem 559. 2. P/M 49. m. a. 3. Atks. 422.

affinity. Relationships by marriage (in in y case of y Wife of y Intestate) gives no title to a share of y distrib-
-ution. Thus if A's son dying before A, leaves a Widow
She on her death, has no share in A's Estate under
y St. So if his children had all died before him,
all leaving Widows or Widowers, they are not as
Widow &c of him to y Intestate.

And a wife expressly entitled by St, is not in
any legal sense, of him to y husband. Hence if
one bequeaths his effects among his next of Kin,
as if he had died Intestate, his widow is held
not entitled to a share. Tole 386. 14. Ves In 372.

115. If a Bastard dies intestate leaving no wife or
child, his effects go to y King or in America. to
y State. he having no other kindred y n his own
descendants. Tole 386. 7. 107. Com. D. adm^d a. 3. P/M 33. 1. Wood. 398. Doug 342. 8. 2. Bl. 505. If he
leave a wife only, one half goes to y King or State.

The Personal property of an Intestate, wherever situated,
must be distributed according to y Law of y State,
in wh his domicile was at his death. 1st in wh
his permanent and fixed abode was. Tole 387
2. Ves In 198. 1. Wood. 385. amb 25. 7. 416 2. Ves 35.
1. HC Bl 684. 690. 2. Do 406. 4 JAC 182. 192.
vide case exemplifying y rules of distribution under
under y St 22. 23. Ch Sec^{no}.

Assets. &c.

Assets are either Real or Personal. Legal or Equitable.
 * Tole 402. 4 Burn Eccles. L. 288. ante 6.9. * The
 Personal assets of a testator are regularly a fund, which is
 eventually to satisfy debts and legacies: tho in some
 cases, a Real may be taken by a Creditor.

Real Estate descended to an heir in fee simple, is Real
 assets, and liable at Law for y satisfaction of Specialty
 debts, if y debtor had y Legal Title. Tole 402. 3 Woodd. 439.
 3 P. Wm 401. If he had only y Equitable Title, his assets
 in Equity. These are sometimes called assets by descent
 as Personal assets are called assets "inter manus" i.e.
 in y hands of y Exr Tole 402. 410. Touchstone 496.

An estate "Per Antea hie" if devised, (as by y L of Wills,
 it may be) is real assets. So, if it fail to y heir
 as Special Occupant. Aliter it goes as Personal Property.
 to y Exr &c Tole 410. 1. 140. 2. P. W. 125. 2. 589. 60.
 3. W. M. 896. note (P. (3. 2. edition) Pre Chy 16. 1. Pow.
 39. 2. P. W. 380. 2. T. R. 229. 6 T. R. 291.

But these rules were introduced by y L of Wills,
 and y Count L contains no such provisions.
 By y L 3. W. and Mary, Ch. 14. lands devised
 are subject to y Devisee's Specialty debts, y devisee
 being as to Creditors ^{Specialty} declared fraudulent, and an
 action lies generally vs y heir and Devisee. By
 y O Law (or rather before y L) there was no such
 remedy in y case of lands devised. Tole 411. 2. P. W. 373.

See "Devises" For Exceptions to y provision, see
 2. Atk 154. 292. 1. Br Chy 211. 3. D. 514.

Creditors for Specialty may take y Real Estate in y
 hands of y heir or devisee, tho there are Personal assets
 later for all y debts. But in such case, y heir &c
 are entitled in Equity to an Reimbursement out of y

of y Personal assets. Tole 6.1. 3. Wooded. 485. 2. Atk
125. 3. & 406. 3. P.M. 333. 1. & 680.

119

Legal assets are those wh constitute at Law a fund
for y paymt of debts, hata their legal priorities. In these
y interest of y testator &c. must have been legal.

Equitable are such as can be reached only by a Ct of Equity.

As Eqty of redemption. y interest of y Certain Due Trust
&c. Tole 415. 12. 2. Bern 764. 2. Atk 1 234. 2. P.M. 416.

3. & 342. ambler. 303. and are therefore applied
hata y rule of Equity. 12. to y paymt of all debts.

"pari passim" Tole 412. 2. T.M. 403. n.d. 3 Wood 436.

2. P.M. 416. n. 2. (*) The Court Law knows no such
Interest.

In Court there is no priority even at Law. between debts
by Recd. Specially. Simple Contract. The above distinction
is therefore of no practical consequence here.

Lands devised to be sold for y paymt of debts.

is Equitable assets. as y Trust can be enforced only in
Equity. Tole 412. 1. Role 920. T.C. 265. 1. Bern 63.

2. & 405 Pre Chy 127. sed vide Off Cor 74.5. (+ he can
only be liable in Equity)

So as y rule now appears to be, if devised to an
Exor for such a purpose. or if a mere power is devised
to him. ante 7. Tole 413. 4. 1. Br Chy 137.8. T.M. 398. n.
Co Lite 113. n. 2. 2. P.M. 552. 416. n. 2. 2. Bern 138.
Pre Chy 408. 2. Atk 1 50. 2. Br Chy 94. Hata y other
opinions however. y assets in y last case were deemed
Legal. Tole 413. 14. 1. Role 920. Co Lite 286. 1. Br Chy
135.8. note S. 1. P.M. 151. For by y older authorities
tis said he takes as legal Representative. Secus now

So where lands charged with y paymt of debts
descend. to y. her. at Law. Tole 415. 2. T.M. 398. n.

2. Br Chy 194. 8. bes. 26. 1. Br Chy appx 6.
 Formerly it was held Contra 15 y^t assets were
 legal Toll. 415. 1. P/M 430 2. alk 290. 2. P/M 415. n².
 Because y Trust must be enforced in Equity.

The Personal effects are first to be applied towards 120.
 y payment of y Testator's debts and General Legacies. in Marshall's
 exempted by Express words or manifest intentions.

Toll 47. or 417. 1. P/M 294. * for y Testator has a right
 undoubtably to charge y Real Estate with y Payment.
 vide Post. nt. 1. 2. P/M 366. 1. Nils 24. S. C. 2. alk 824.
 3 alk 202. 2. P/M 324. amb 33. 1. Br Chy 144. 5.
 456. 7. Pre Chy 104.

So this all y Real Estate is devised subject to y
 payment of debts, or directed to be sold for y purpose.
 Toll 418. Burnb. 301. 3 alk 20. 3. P/M 322. 2. Ely Co.
 493. So y mere subjecting of y Real Estate, don't
 supersede y prior liability of y Personal, in y
 Personal is specially exempted. So this y debts be
 secured by mortgage: y Personal assets will first
 be applied in Exoneration of y Realty Mortgaged.
 Talbot 410. Salk 449. 1. P/M 360. 2. alk 436.
 1. bes. 251. 2. Br Chy 273. 2. P/M 386.

So lands charged with or devised for y payment
 of debts, will be applied to y discharge of mortgaged
 lands, as descended or devised. Toll 418. 1. alk 487.
 1. Pre Chy 240. So even this y mortgage lands be
 devised expressly subject to y Incumbrance. Toll 418.
 2. P/M 386. and lands descended will be applied
 to y discharge of mortgage lands, devised. Toll 418.
 2. alk 484.

As to Priority in y application of Real assets,
 when y Personal are exhausted or exhausted, 1. Real
 Property expressly devised for y payment of debts

shall be first applied. Second. Real Estate. . . .
 liable by y Eng Law, only for Specialty debts.
 Third. Real Estate specially devised subject to a
 General charge of debts. 2. att 424. 3 att 366.
 2. Por Chy 257 261. n. 3. Res § 2 117. Tole 419. 20.
 1. P. M. 294. n. Marshalling arranging by Priority-

121. Assets are marshalled on similar principles
 in favour of Legatee, see Tole 419. 420. 3. P. M.
 323. 1. Is 422. 2. Is 520. 1. Is 680. for particular rules
 and cases) Ex personally first applied. in Exempta
 and if payable out of y Real Estate, y Priorities
 are y same as under y last Rule.

120.

Devastavit.

A wasting of y assets by y Ex², violation or neglect
 of duty is called a Devastavit, and renders him
 personally answerable for y amt so wasted.
 Tole 424. off Ex² 157. Com D. adm² § 1.

An Ex² he may become thus answerable in various
 ways. as by Embezzling. Destroying, Consuming, or
 giving away y assets. by misapplying ym. as in
 extravagant Funeral Expenses. by paying y Legacies
 to y prejudice of y Creditor of a higher order.
 Tole 424. 246. off Ex² 158. 2. P. B. 508.

So if he releases or cancels a debt due to y Testator,
 he is charged with y amt, an he rec^d it or not.
 Tole 424. 5 off Ex² 159.

So if he releases any cause of action accruing
 in y right of y Testator. Tole 425. off Ex² 159.
 Rob. 50. Cro Elv² 43. & y is giving away so much
 property. If he submits a claim to arbitration and obtains
 an award less ym is due, he is liable for y difference.
 off Ex² 71. 159. 50. award he 9.

If he takes an obligation in his own name, for a debt due by simple contract to y testator, he is liable for y debt. For y original debt is extinguished by his act. Tole 425. Yelv. 10. 2. Lev 189.

So if by compromise or by giving longer credit, he loses a debt or part of it. Tole 425. 2. Lev 182.
1. Bes 474. Post 138.

13. So if he pays a usurious debt contracted by y Testator &c. Tole 425. T. C. 167. Day 129. Quere if he was ignorant of y usury, for he may have paid it ignorantly.

So if his unnecessary delay in paying debts, occasions an additional charge upon y assets, by y accumulation of Interest. Tole 425. 2. Lev 40.

So if he loses y Chattel in his hands as assets. Tole 425. 2. Vern. 299. by any fault of his own.

So if by his delay, he permits y St of Lim^{ns} to bar a debt due to y Testator. Tole 427. 12. Mod. 573.

So if an agent employed by him to collect y assets, embroyles ym. Tole. 427. 6 Mod 93.

So if he retains money in his hands for an unreasonable time, when he might have made it productive, he is chargeable with Interest for it. Tole 427. 2.
Yonlb. 184. n. P. 2. Vern. 743. 1. Por Chy 375. 3. Do 73. 433. 107.

If he sells y assets at an under value, he is regularly liable for y full value. Tole 428. off Exr. 158. 6 Mod 181. 2. This rule doobless supposes y (they might have been sold for full value for some goods can't be sold for full value. In case of Perishable goods, he ant liable for a loss by natural decay, in caused by his own neglect or delay. Tole 428. 6. Mod. 181.

124. If he lends money on Real Security, apparently good, he ant liable for a loss of it. Tole 428. 1. P. M. 141. Post 138. (Tole 429. for other Examples) Com. L. admn. 1. 2. off. Exr 139. 1. Tourn 307. 281. 1. P. M. 381. "It seems implied, yt if he had witht such Secum, he wd be liable"

He ant liable for a not bleeding y St of Lim^{rs}. to a debt due from y Testator &c. Tole 429. 342. 1. Eqty. Co. 305. Pre Chy 100. 15. Bes. Dn 498. For y debt remain and ought in Justice to be paid, ante 97. Quere ant he bound to do it in favour of Creditors and General Legates? Ad not y correct rule be. yt he is liable to Creditors but not to Legates?

If y husband of an Exr commits a Devastavit, when y executrix began before marriage, both are chargeable. where it commenced post. y husband alone is liable. In y former case, her liability is attached before y marriage. Aliter in y latter case. Tole 430. 358. 2. Br Chy 323.

If an Executrix after committing a Devastavit, marries, both are liable during Coverture, but y husband's liability ceases with y Coverture. Ibid.

A Devastavit by one of 2. Exrs don't render his Coex^r liable, y latter is in no fault.

Tole 430. off Exr 61. 2. D. 7. 210. 2. Br Chy 14.

Tho he may make himself liable, by joining in a bond for y faithful discharge. &c.

125. Remedies for Exrs and Adm^s at Law and Eqty.

As y Exr and so forth, represents y Testator in respect to his personal contracts, he may maintain such actions to enforce y m. as y Testator himself

might have maintained. Tole 431. 2. 158. Cro Elr 377. Lach 167. 1. Role 912. off. Exr 65. as he may maintain debts on y Testator's Judgments or Specialties: Covenant broken on Covenant for a Personal thing. or Realty. if broken during y Testator's lifetime.

Affidavit or debt on Simble Contracts. De. Tole 432. Com. I. adm^r S. B. 13. Salk 314. Id Ray. 97. 1502. 2. Vent 349. 3 Y R. 660. vide Covent Broken, (*) for Testator then wd have a right to require damages wh are Personal

So by St 2. Nestmo. an account tho latterly disused in Eng. Tole 433. Com I. adm^r B. 13.

So by St 4. M^r Edw. 3^d Ch 7. he may have an action of Trespass, for carrying away Testator's goods. in his lifetime. This St has always been extended in construction to adm^rs, tho not named, as for Trespass on y Testator's leasehold Estate, for cutting and carrying away his growing corn. Tole 433. 158. 1. Vent 187. Tho not goods.

* And tho y St mentions carrying away Goods only, yet it is extended in construction to tho Injuries in general. to y Testator's property. Tole 433. 158. Lach 168. Com I. adm^r 13. 13. ante. 7. * The C Law maxim was actio personalis morietur cum persona

So for conversion of Testator's goods, in his lifetime. The Exr may have Trover by y Ety of y St. Tole 433 4. 158. Mod 400. Cro Elr 377. Lach 168. 1. Leon 193. 4. 1. Vent 230. Tho there was no "carrying away".

So he maintain Ejectmt for y ouster of y Testa^{tor} 126. and it seems, tho he was even seized in fee. For in y last case. y action may be maintained

only. Vole 434. 1. Bent 180. 3 M.R. 13. 3 Bae 92

So by y C Law. he is entitled to Replevin for goods destroyed in y Testator's lifetime, or an action of Detinue for a Specific Chattel: or to bring Ejectment for y ouster of y Testator from a ten of yrs. For in these cases, y subject matter of wh y Testator was deprived, is specifically recovered, and y Title to it is in y Exr. Vole 434. 1. Sid 182. Lach 168. off. Exr 525

So by y St 4. Edw. 3. an Exr shall have an action as a Sheriff for y escape of a party, in execution on a judgment recovered by y Testator: tho' y escape was in y Testator's lifetime. So for a false Return. De. Vole 430. Com. D. adm^r B. 13. Cro. C. 297

Id Ray 401. 973. 1. Roll 913. 4 Mod 404. Lalk 12. Comb. 322. 3. This there are no goods and no carrying away in y case. (It is very different from carrying away goods &c) (no St has been more extended)

So a Writ of Error to reverse a judgment rendered or recovered vs y Testator in a personal action Vole 435. Lach 167.

Quere to reverse y Testator's attainder? I amble not. Vole 435. Lalk 295. 4 Bl 387. For y Testator's goods being forfeited by y conviction (not by y attainder) y Exr seems to have no Interest in y Reversion.

So for other torts generally, by wh y testator has suffered direct pecuniary loss, or damages and wrong in general by wh his Personal estate has been injured or impaired. Vole 159. 439. 5. 6. Lach 167. off Exr 71.

127.

But an Exr has no right of action for an injury to y person of y Testator as Battery, Slander, &c For y C Law gave them no remedy and such

injuries are not within y^e Stat of Edw. 3. Tole 436.
Com. D. adm^r B. 13. Tach 158. 9. ante 72.

Not for an injury to y^e testator's freehold as
selling his wood. cutting his grafts. For y^e injury
ant to y^e Ex^r or y^e Personal assets. but to y^e heir
who may have y^e action. Tole 435. 1. bent 187.
off Ex^r 67. 8. ante 72. For y^e Emblements he
may maintain actions.

An Ex^r may maintain Personal actions of any
kind, y^e cause of wh^{ch} accrued after y^e testator's death,
as on a bond forfeited after y^e event. Tole
437. Com D. Pl. 2. D. 1. 3. Lea 312. 1. Role 602.

So on a Personal covenant broken, after y^e testator's
death, or any species of Personal contract, becoming
payable after y^e Event. Tole 437. off. Ex^r 82. 1. 5 R. 487.
4. Do 555. Com D. Plead. 2. D. 1. 5 C. 31. B.
Cro Ch. 225. 1. Leav. 250.

So for taking away or destroying y^e assets after
y^e testator's death, for Trespass committed on his lease
hold Premises, in y^e Ex^r's possession. Tole 437. 1. Roll 602.
6 Mod. 92. Com. D. adm^r B. 13. off. Ex^r 70.

So an Ex^r may have an action vs a Sheriff
for an escape after y^e testator's death, an y^e R^ugment
was recovered by y^e Testator, or by y^e Ex^r himself.
Tole 438. off. Ex^r 45. 1. Role R. 275. 1. Ray. 35.
5 R. 128.

So he may have an action on a Bail bond,
assigned to him as Ex^r of a deceased Pl^{ty}.
Tole 438. Tenth 370.

So on a bill of exchange, endorsed by him as
Ex^r and he may sue upon it, as Ex^r Tole 438. 1. 5 R. 487.

So on contracts made with him as Ex^r Tole 438.
Com. D. Plead. 2. D. 1. Cro Ch. 885. 1. Role. 602.

572

118

As a general Rule an Exr, when Plf ant liable
for costs. For he owes in right of another, and is presume
not sufficiently cognizant of y foundation of y claim
he asserts. to be considered in fault by bringing on
unfounded Suit. Tole 439. Cro. B. 228. Yelv 158. Carth 281.
3 Lev. 370. Ser 382. 3 Bb. 400. Talk 207 3/4. 3. Bac. 1566.
4 T R. 277. 281.

This rule ^{holds} whenever it is necessary for him to sue in his
representative capacity and to name himself Exr. Ibrd.
as in actions to recover debts claimed to be due. to y Testator.
Trovee for conversion y Testator lifetime. &c Ibrd.

129. Aliter even tho he names Tole 440. 11. Mea 256. 4 T R 280.)
himself Exr (and this he may always do when y avail
of y Suit, wd be asserts in his hands. 1 T R 489. 4 do 281.
2 East 104) if he might have sued in his individual
Capacity. as for taking goods belong to y asserts from his
own possession. or in Trover, when both y Trover and y
Conversion are after y Testator's death. Tole 439. 440. Lash.
220. 1. Vent 92. Vent 78. Talk 344. 7 R 308. 4 do. 259.
10. East 293.

So in actions for money had and rec^d after y Testator's death,
or on an obligation given to himself to secure a debt due
to y Testator. Tole 440. 3 T R. 234. 2. do 477 4 do 280.) For
in all these cases, y cause of action accrues to him personally
and y reason of y General Rule. (ante) dont apply.
(He is liable for costs for misleading.

So if he brings Error, when he was liable to costs, in
y original action. Tole 440. 1. T R Bb 585.

So if he fails by his own (misleading. For he fails
by his own fault, or at least he obliges y Jcy to answer
to a claim insupportable upon y face of d. as when his
declaration is ill and Judgment goes vs him on Demurrer.
Tole 440. 6 T R. 654. 3. Burn. 1584.

If a party to a Personal action dies, after Final Judgment in his favour but before Exec, his Exec may sue out Exec by Petre Facias. Tole 442. Com D. Exec E.

If he dies after execution (as a Fi Fa) there is no need of a Pet Fa. For y Exec may be executed, and y arails must be paid by y Sheriff to y Exec or lodged in Co tile adm^r granted. Tole 442. 6 Mod 207. Noy 73. Dyers. 76. 6. Co Ch. 459. La Ray 1073. 1 Sid 29. Tidds practice. B. R. 332. 3.

As to abatement of Suits by death of Parties and Heir 130
Survivance for and vs Exec. see Pleas^d 41. 2.

If where badmen have a right of action, one of ym dies before Suit his Exec cannot join y Suit at Law with y Survivor. Contra Com D. Merchant D. 2 Lev. 188. 228. 1. Freeman 468. Mats 300. The entire right of action survives to y latter. Subject however to account with y Exec for y arails of y Suit Tole 444. 105. 5. 153. Galke 444. 1. Show. 188. 3 Lev. 290. 1. Cask 170. 2. JR. 475.

If a feme Covert is Exec she and her husband must join in actions in right of y Testator. Tole 445. Com D adm^r D. off. Exec 204. 8.

Co Exec are regarded as one person or officer. Hence they must all join in action, even tho some have omitted to prove or refused before y Ordinary. Tole 445. 41. 5. off. Exec 42. Com D. abatement 313. Com D. Plead. 2. D. 1. J. Co 37. 1. Lev 16. see Pleadings Survivor Declaration. ante 58. 78.

By St 25. Edw. 3. Ch. 5. y Exec of an Exec has y same right of bringing actions, as y first Exec Tole 447. off. Exec 257. Godolph 262. ante 35.

An Exec de Ten Cort can maintain no action in right of y deceased. Tole 447. 38. 6. 2 R. 307. 2. F. Hen 583.

3" An adm^r may maintain actions by y above Rules as an Exec may

An adm^r may maintain action in y some cases, in
 wk an Ex^r may. Tole 449. Com & adm^r B 13. off Ex^r 259.

131. Co adm^r like Co Ex^r must all join in actions, both
 brot in right of y^{de} Intestate. Tole 448. Com & adm^r E 14.
 Com^r D. 10. Pleader.

11 In Equity. The Ex^r represents y Testator as well in respect of
 Equitable as Legal rights. Tole 454. and many of courses
 enforce ym. in Cts of Eqty. Com & Chan. 2. B 1. 3. G. 1.

Thus y interest of a deceased partner rests in Eqty in his
 representatives Ctho y remedy at Law survives to y Survivor.
 The Ex^r may therefore maintain a bill for an account,
 vs y Survivor. Tole 454. Mats Part. 124. 294. 5. 1. Ld Ray
 340. 2. bes 240. 252. "Partnership 4"

If pending a suit in Equity, y Plt^y dies, his Ex^r &c
 may continue it. by a bill of Revisor. Tole 445. Mithy
 63. 4.

And one Ex^r may in Equity sue his Ex^r as such.
 not so at Law. Tole 457. 11. Bern 363. 5.

If a bill is brot by an adm^r durante de y Ex^r when
 legally capable of acting, may continue y Suit by a
 132. Supplemental bill Tole 458. Mithy 61.

Remedies vs Executors.

The Ex^r is liable to y extent of y Personal assets in his
 hands, for all debts of y Testator &c, and upon all y
 contracts in general. both Special and Simple. Express
 and Implied. J. C 89. B. 10. Do 17. B. Co Ch 295. Flow.
 182. Com & adm^r ^{B 14} 73. an named in y contract or not,
 Tole 459. 55. off. Ex^r 117. 18. Co Ch. 187. Yels. 103. Com &
 adm^r B. 14.

And an action lies vs y Executor &c of a Sheriff
 on a Judgmt given vs y latter, for a violation or neglect
 of duty. as for an Escape. Tole 459. Dyer 322.

To for vend due from y Testator. Tole 400. Salk 207
Com D. Court C. 1. vide Title "Covent Broken" for
Examples.

But when y cause of action is a Tort. or arises
Ex Delicto" supposed to be by Force. and must be declared
upon a Tort. y Exr Is ant liable. *actio personalis
monetur cum Persona* as Barratry. False Imprisonment.
Trespass Hinder. Murance. Diverting a watercourse.
Escape. Violation of a Penal St. Tole 400. Com D. admr
B. 15. off Exr 127. 8. 3. Bl 302. Cowp 375.

In y preceding cases, y actions dies or survive kata y
nature of y cause. of action. Tole 461. There are other cases
in wh y action dies or survives with y Testator, by
reason of y Form. of y action. Ibid. Thus a right 133.
of action on Contract in wh y testator might have
waged his Law, dont survive vs y Exr Is. For
an Exr as such cd not wage his Law. As in debt
on Simple Contract.. Tole 401. Cowp 375. + But as y
has gone into a course, I dont see why y rule may
not be good.

But all other actions will lie vs y Exr Is on
y very same cause of assumpsit. and no form of action
in wh y form of declaring, must be *Quare vi et
armis et Contra pacem* (as in some of y preceding
Examples") Battery. Trespass. False Imprisonment) or wh
y General Issue must be, "Not Guilty" will lie
vs an Exr Is. Tole 401. Cowp 375. As an action on y
custom of y Realm. vs a Common Carrier. It being a
Tort. and requiring y General Plea of "Not Guilty" tho'
not *laud vi et armis*." Tole 401.² Cowp 375. 6.
For y question of ones guilt or innocence cant be tried
after his death.

And still in many cases of Tort. y Exr may be subjected
in a different form. of action. not forming in free. nor.

requiring y idea of 'not Guilty' Thus in y case of y
a Common Carrier, (ut supra). Assumpsit. on y Contract
Express. or Implied. will lie vs y Exr. Id. Tole 461. 2.
Cowp 375. 6

So if one wrongfully takes and uses another's horse.
The Exr of y wrongdoer ant liable for y taking, wh is
a Trespass. (But an assumpsit on an implied contract
for y use of him. will lie vs y Exr. Tole 461. 2. Cow 375. 6

134. So if a Testator cut down another's trees, his Exr ant
liable for y Trespass. * But he may charged with y
value of ym. Tole 462. Cowp 376. 1. Ch Pleas 80. 3 Tole.
549. * if he take ym away and use them.

So he is not liable in Trover for a conversion of another
goods. by y Testator. But if y testator sold ym, his
Exr is liable for y price as money had and received
by y Testator. Ibid.

Or if they remain in Specie, in y testator's possⁿ
at his death. and Exr retains ym after demand
by y owner. Trover lies vs Exr as for his own Conversion
Cowp 373. 4. 1. Chit Pl. 8. 1. Pann. 216. 7. Tole 13.

The distinction then in case of Exr. is y, if y wrong
done by y Testator procured him no gain. profit,
or pecuniary benefit, his Exr. Is ant liable in any
form of action: for y only ground of action, or claim is
y Delictum or Wrong. as in y case of Battery. Slander
&c.

Aliter if it procured him any such gain &c. for
in such case y Testator received a property or interest
wh y Exr ought to restore or make compensation for
and an action not sounding in Tort will lie
vs him. It is then, a question not of y Testator's
guilt, but of Meum et Tuum. - of a right of

a right of property. Tole 462. Cowb 376.7

An Equity in some cases gives relief to Ex^r when there is none at Law. As against y Ex^r of a Tenant for life in favour of y Remaundersman. Ch Pleas. 80. & after 757. 2. Ves 560. 2 vents 36. 3 TR. 549.

He is liable to y Testator's contract, tho y right of action don't accrue till after y Testator's death. Tole 462.3. Com D. Pl. 2. D.2. As on a bond forfeited or not payable after y Event.

In all these cases, y Ex^r is liable only to y amt of assets in his hands; and y Judgment to him, is for debt or damages to be levied of y goods & chattels of y Testator in y Ex^r's hands, if he has so much in his hands to be administered: and if not, then y Costs to be levied "de bonis propriis" For y costs accrue from his own neglect. Cro P. 671. 2. 7. TR. 357. Tole 463. 9. Lea 941. 4 TR. 648.

But an Ex^r I may make himself personally liable, de bonis propriis as by a Devastavit. So by pleading a plea wh he knows to be false, and wh if true, wd be a perpetual bar to y action. As "Ne Unques" Ex^r or a release to himself. In wh case y Judgment is de bonis Testatoris, et non de bonis Propriis" Tole 462.4. Com D. admⁿ 13. off. Ex^r 157. 164. 183. Role 930. Godol 198. 1. Bl R 400 Cro P. 71. & 2.

It was once held, yt an Executor was liable in his representative character, in an action at Law, on his Express promise to pay his a legacy, in considⁿ of assets. And once that he was

liable under similar circumstances in his private capacity. Tolt 455. Cowp 284.9.

But these decisions are now overruled. Tolt 465. 320.1. 5 T R 690. See R 73. 3 T R 557. 8 D. 593. The proper remedy is a bill in Equity. Ibid 3. P. Mr 262.

Costs can't in General be held to Bail, for they are in general personally liable. Tolt 467. Cro B. 307. yels. 53. Cro Ch. 59. Aliter if they have wasted assets and suggestion of a "Devastant" is supported by a Pltff's oath. Tolt 467. Lev. 39. Cartt 264. 1 Mod. 16. * and when not personally liable a person can't be held to Bail -

So where on an Execution vs a Sheriff Cost. & Pltff returns a "Devastant" and debt is put on a Judgmt. Tolt 467. Com. 206. 1 Sid 63.

He may be sued and held to Bail - for there is good cause to suspect him of Guilt.

136. So where a Cost has bound himself by his own personal promise to pay. Tolt 467. (here he is a Principal debtor. If he pleads a plea, wh he knows to be false, he subjects himself personally to a Cost, even tho' not chargeable with a debt, as if he obtained a Bankrupt Certificate I has no assets, and a Judgmt for costs is de bonis Testatoris & de non de bonis probatoris. Tolt 467. Plow 188. VCaro. 168. Cro Ch 103. 4 T R 641. 7 D 309.

If y Def in a Personal action dies after Final Judgment. but before Execⁿ y P^{ty} may by Sci Fa, have Execⁿ vs y Def's Ex^r Tole 469. Com & Ex^r D. 7. Com. & Pleas. 3. & 7. 6. 5 R. 308. 7. & 24.

But if y Execution be tested before y Def's death, it may be executed on y effects in y hands of y Ex^r with a Sci Fac. Tole 469. Com. & Ex^r D. 2. 7. 2. Bent 218. Skinner 257.

Where there are assets to accrue in future y Ex^r is liable to a Judgment of y assets "Quando accident." as when a debt is due to y Ex^r payable in future. Tole 470. & C. 134. Cro El 372. 2. Sam 226. 1. & d 448. 1. Lev. 285. 1. Bent 84. 95. 7 Thun 29. 2. Hob. 606. 621. 631. 66. 71.

But in such cases, Execution don't issue, till y assets accrue, but may then be obtained by Sci Fa on y Judgment, or by bringing debt on y Judgment suggesting a Devastavit. Ibid. (wh is y more summary way.)

A Limited Ex^r is also liable to actions, during y continuance of his office. Tole 471. Off. Ex. 216. 5.

As to y mode of suing, where there are ~~two~~ ¹³⁷ two Several Ex^r. See Pleading? When some are Infants. see Parent & Child.

As to remedies vs an Ex^r "De Bon Tort" see ante 61. 8.

The foregoing rules subjecting Ex^r ap^{ly} in General to admⁿ an General or Limited Tole 474.

5 Com & admⁿ 4. or 5. 1. & d 57. 1. Hod 174. 5.

The Exr. of a deceased partner cannot be joined as Co Def. with y Survivor, for y former must be charged de bonis Testatoris. y latter. "De Bonis Propriis."

Toll 478. 2. Lev. 228. (But y Creditor may subject y former alone at Law. or y latter alone in Equity. (* not as Executor. If y partner is Insolvent, y Exr may be subjected in Eqty. if he have assets.

An Exr he is liable is liable in Chy to all equitably demands. upon y Personal assets of y Testator. Toll 479.

If pending a Suit in Equity, y def dies, y suit may be continued vs y Exr or by a bill of Revivor. Toll 479. Mitth 63. 4.

Legatees and persons entitled to distribution in cases of Intestacy, have relief in Equity vs Exr and adm^r who are regarded as Trustees to those entitled to y beneficial interest in y assets. Toll 480. 1. atts 491. 491. . P Mm 552. 575 2. Tonbk 322. 1 Rem 133. 4. 4 Bents 362.

138. Thus a bill lies for a legacy, for a discovery and account of assets. for y distribution. if Intestate Personal Property. Toll 480. 1. P Mm 287. 2. Doubl. 321. n. a 322. Com. D. Ch. 3. D. 1. The Exr may be compelled to disclose under oath. sh disclosure is Evi in a Ct of Law.

So if an Exr has denied assets in a Ct of Law. a bill lies for y discovery of ym. to enable y Plff to maintain his action at Law. Toll 480. Com D. Chanc. 2. G. 3. Com D. 3. B. 2.

So a bill has no hint to account for Interest, wh he has made of y assets. Tole 480. 1. Pss Chy. 375. 11. Bem. 433. n.

As to Rules subjecting an Exor for interest see "Usury" 31. 2. Tole. 481. 1. Pss Chy 359. 1. Res. In 294. 13. Res. In 402. 7. 11. Res In 58. 92.

If he compounds debts due from y estate, he must ^{In} Equity account for y benefit, or rather those entitled to y Surplus. shall have y benefit of composition. Tole 481. 1. Salk 155. 11. Bem. 433.

But he aint accountable for y loss of money lent by him on Real Security, apparently good. For he ought to make interest, if he can on money lying on hand. and must exercise his own Judgmt. Tole 481. 428. 1. P Wm 141. 4 Burn Ecc L. 428. ante 124.

If he compounds debts due to y estate, he is chargeable in Equity, only with what he receives, if y composition appear to have been for y advantage of y Estate. Aliter he is chargeable for y whole debt. Tole 481. 2. 429. 3. P Wm 381. 11. Bem. 432. ante 122.

In general he is bound by an admission of assets. Express or Implied, as by paying interest on money in his hands. But he is still allowed to show yt they have been lost. without his fault. (As by y failure of a Banker) or yt y admission was made under a mistake. Tole 483. 2. Res 85.

When subjected for a breach of Trust or neglect,
 he is liable to Costs as well in Equity as at
 Law. Vol 483. 11. Res. P^r 58. 1. P^r Chy 11. 362.
 1. Res P^r 294. 1. atts 468.

Finis of Ex^r & adm^r

131.

524.

Covenant Broken 133. Covenant
Express or Implied or in deed or
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Covenant Broken.

This action with some impropriety is grounded on a covenant and claims a remedy for the breach of it. and hence is called an action of Covenant Broken. See 2 Ld.

Mr. Poth says that covenants, contracts and agreements are synonymous and often used as such. But this is incorrect. Contracts are a species of a covenant, and are a species.

A Covenant is a contract written and sealed, and made by deed and signature or Seal. Tichb. 340. 45.

Cp D. 266. Cp D. 266.

And the the covenant is by Indenture, as when a man makes the action to the covenantor that he has sealed on the covenantee has done so or not.

Cp D. 266.

The usual remedy to enforce a Covenant is by action of Covenant Broken, or damages. But there are some covenants to pay a sum certain, or a sum which by agreement may be rendered certain, &c. &c. with this is a Covenant to pay the sum, or the value of the land, &c. &c. in the 1st of the year at the thirtieth day of that time. For 1089.

Bulle N^o P. 167. 3 Lev 429.

It is an covenant to pay 2^d for every cow & horse which I shall deliver into within a year &c. I may have an action for damages, or he may sue in Debt for 2^d & with an agreement that he deliver 50 cows, within that time.

But where the covenant is to some specific act as to execute a deed of conveyance or release, a more common because more accurate remedy is by bill in Equity for specific performance and Chancery will decree in such case, shall perform under such sanction, as he sees proper. See 520.

But when it appears from the nature of a Covenant, or damages will be an adequate remedy, a bill in Chy. can't be maintained on the Covenant. For it isn't the province of the Chan^y to ascertain damages, and besides, Chy. never interferes, when an adequate remedy can be had at Law, and this case is no more, than if the Plt^f don't aver in his Bill, that he has no adequate remedy at Law, the bill is demurrable. 2 Br Chy 341. 1 Lonb 27. 139. 1 P Wm 570

But even in these cases, (that is) where the remedy is in damages only, if the relief sought in Chy. is only consequential to a ground of Relief, Cognizable properly in Chy., a bill will be allowed so where a matter of fraud is mixed with the damages, i.e. where a question of fraud is connected with a claim of damages. Thus, if I sue in a Court at Law, and I file a bill in Chy. for an injunction on the ground of Fraud, I may file a Cross bill on the first demand of Fraud, and in such cases, if the Fraud are proved, I shall have more damages, on the Court and must send the bill back to a Court of Law. 1 Cqly C 17. 2 Pow B. 216, 1 Bac 60. 526.

But in this case a bill in Chy. can't in general assert a sum. If they can't be maintained by computation, the Court must send the issue at Law, to ascertain the amt. and then the Chan will decree y payment.

In Court a bill will enquire into the damages, or refer it to a Committee, (jurors or arbitrators) instead of a Jury, in some cases, the Court will do it themselves.

Covenants are said to be either Covenants in Law, or in Fact. This means merely that all covenants are either Express or Implied. For every covenant must

arise some way out of a deed. 4 Co 80 Co D. 266.7

Express covenants are such as are mentioned and recited in the agreement, between the Parties.

Implied covenants are such as are raised & implied by Law. As it stands to be for a certain term, without any Covenant whatever, by Law raises a Covenant on y^e part of the Lessee, y^t he has good title, and that the Lessee shall quietly enjoy. It has the right to enjoy during the term & all adverse claims. It is implied there, nothing on the face of the deed, which excludes such implication.

Co Litt 384. Co D 268.

The words "Dedi et Conseci" do imply a Covenant. But in Law in Co D. 268. Edition. 110. That these or 2 Cases 118. Similar words imply such Covenants in leases for yrs. only. I not in Leases, of the Freehold.

Q.ued. Sure? What is the principle or circumstance? Is not by reason, the same in both cases. viz that y^e words importing to transfer a title, imply that y^e party professing to transfer it, has it? Such is the principle in the Sale of Personal Chattels. If I sell a horse to B. without more. There is an implied Warranty that I had title to the horse.

Covenants in Law differ from Covenants in Deed, in y^e Covenants in deed are founded on the words used, as implying to an Express Covenant, tho' the words used may not be the most apt or explicit. "As paying and paying Rent," constitutes a Covenant in a deed. There as well as the words "Covent," agree to create Covenant or County Express.

Covenants in Law. are ^{not} implied from the strassology
but from the nature of a contract or agreement. wh. is
expressed. As Concerns the in a lease, in, sort, a Covenant
in Law. y^t the Lessor has good Title.

Carth. 98.

Carth. 98. 4 Co 80. B. 5 Co 17. Ep & 2.67.

2 Nov 92.

Hence before eviction of action will lie on the former,
E. in the implied covenant of the Lease. has a good title.
it seems.

As the Lenoir had not a title after extinction under
its own title, it lies now on the γ later insured Count
for quiet enjoyment.

The former Court is "de Presenti", & latter "de futuro"

The County as Contractor or Employer are either Real or Personal

A Real count is one by wh^o a covenantor binds himself
in some or upon thing; Real, as Land. Tenements &c.

A personal covenant is one entered in the person of
5. ¹⁰⁷ Covenantor or wh concerns the personally only, as to do
such act or service, to pay, deliver goods, &c.

140. This division is derived from a reference to the subject of Count. P.O. 266.

The Set or form of words is necessary to make a Contract
 out any words showing a concurrence of the Parties, in an
 agreement under Seal, are sufficient, as any words importing
 an agreement in a sealed writing. As a Lease to B. reserving
 such a Rent, or B. paying such a Rent, and B. accepts
 of the Lease. Covenant broken for non-payment of Rent.
 will be sufficient, tho' the Seal be a Seal of the Landlord
 3 words of course the Lease is on 202. 67; Rent 10 P^{er} An
 54; 100 on 242.

Is a constructive Count by the Lessee, as he accepts
of Lease.

A Count may be as to something, past, present or future,
as of past Count, in which one covenor yet he has
done something and if he had not then an action
of Count Broken. *See vs. him.*

Present as Covenant of *Seisin*.

Future or common Executory Agreement, as a Count of
Warranty. *How 308.* This case is Prospective. D

Covenants in Law are restrainable by express covenants, "*concessio
facit cessare laedum*" Thus suppose a lease by words, "*concessio
et assignatio*" and it is a Count of the Lessee has, good
title, and followed by express Covenant to Eviction.
by the Lessor, or any claiming under him, then the Count
is broken by a stranger coming in, and will, even tho'
the Eviction be under *Color Title*.

This said to be locus of a Count in Law, alone, but
if express Count restrains the Implied as to Eviction
by or under Lessor, for such is the plain intent.

It has been said that on the implied count, raised
by the words, "*concessio et assignatio tradidit*" this action
doth lie for a stranger's entry.

This means turned a forcible entry and not an entry
under an *Old Title*, compare the last cited case, *How 214*, with *L. 20 80*. The words "*Old Title*" mean paramount
Title.

A Recital in a deed of a former parcel assigned
agreement, creates a Count on which an action will lie,
as Whereas it was agreed, or has been agreed, &c.

A deed pay \$25 & deed confirms a lease agreement
and makes an express covenant on the part of L.
that he will pay. See "Contract" Ch D 268.

3 Feb 400

But as to covenants in a deed, if the word "covenant"
is not used, there must be some words which import an
agreement, or no covenant will be created. As a lease
for 99 years covenants to repair and to agree that
L & his heirs shall furnish timber. This is not only a
qualification of the Lessee's covenant or obligation to
repair but a substantial covenant by the Lessor.
Exp 207. 1 Roll 318.

Aliter without the words "it is agreed" And then he
only a condition precedent. As the Lessee's obligation to
repair. Com. D. 360.

So if a lease contains a clause "provided" ^{of} "upon
condition of" & Lessee does such an act, this is no covenant
but a condition to defeat the lease. 1 Roll 518

1 Selw 48

So when any provision or clause in a deed is in the
nature of a defeasance, it is not taken into account at
law. Upon such provision or clause it being the
effect of defeasance, not to create an obligation or
right of action but to destroy one or at least to qualify
it. 1 Roll 38. Ibid

As lease to B with a proviso that if B shall die
within 10 years, his heirs shall. & premises for 21
years in remainder of A. This proviso is a covenant
not a lease.

It is not a lease by reason of the uncertainty as to the

beginning and length of continuance.

If a lessor executes a Bond conditioned to the performance of Covenants in another deed, it extends as well to Covenants in Law. It implies covenants as to those which are Express.

As *De di et concessi* in a lease. If a bond given to perform all the Covenants in the Lease. In this case if the title fails, the lessee may sue on his bond and recover. 4 Co 80.

Construction of Covenants.

Covenants are to be construed liberally. i.e. the meaning of the Parties is to be sought with strict adherence to Technical Rules: as in case of Deeds, or Grants Absolute. i.e. Deeds of Conveyance, but must be construed more liberally in deeds. 1 Toll 419. Co Litt 45 B 1 Bac 539. Flow 140.

In many instances therefore a literal performance will not be satis. as a Covenant to deliver a bond, to B on such a day, B being the obligor. A before the day sues B, on the bond. & recoverd then delivers it on the day he is liable on the covenant. There there is a literal but not a substantial performance, - not according to the true meaning of the contract. Covenant.

1 Bac 534. 1 Leo 52. 30 El 7. 1 Selw. 48. Esp D. 270.

So on the other hand, if one covenant wth his son being under the age of consent, shall marry the covenantee's daughter, before he attain that age, & he does marry wth her and afterward, dissent, there is no breach, tho' it is strictly no marriage. There the performance, tho' not literal, is substantial.

So if the lessee having covenanted to leave all the timber on the land, cuts it down & leaves it there, it is a breach. The performance in this case is literal, but not substantial. Ray 464. 1 Hc BL 476.
Esp D 271.

A covenants to deliver a piece of cloth to B, but cuts it into tatters, & then delivers it at the day. This is also a breach. Ray 464. Esp D 271.
Bac 429. 242.

So where a brewer covenanted wth Pitts sh^d receive his grains and sh^d sell them, this was holden a breach.
Ibid Trin 39. 40.

Where words are uncertain they are taken most strongly for the grantor, or cove^{tor} and most beneficially for the covenantee. As if covenanted, that if Pitts w^d marry his daughter, he w^d pay him 20 £. per annum. he was holden liable during Pitts' life. 1 Geo 102. 1 Sel 151. 1 Dig 171
1 Bac 579.

A covenant to pay 50 £. it was solemnly debated,
an 50 £ in stone or oath were meant.

1 Fel 151,

If a covenants to convey land by such a day
and before the day conveys it to another, a Covenantor
is immediately liable. For if the party once voluntarily
disables himself, to perform a Covenant, he is
considered in law as having broken it, and if the
purchase money has been paid in advance, it
may be recovered back, as money had & received.

"Apumoit" "Contracts" 5 Co 21. a 7. Do 15. a

1 Bp R 434. 2 Do 522. 6 Do 110.

When an Exception in a Lease amounts to a Covenant,
by Lease and when not, see 3 Co Cliv 659. 30.

Com. D. M. ^{1st} C. 2. Carth 232.

E

But where the Lease is of a given subject, in a
certain part, & Exception unto a Covenant, yt the
lessee won't occupy or disturb. As lease of a
manor. in a certain close, tis mere matter of reversion—
if entered upon, trespass lies— "Intra"

Secus where the Exception is of a right or profit to be
derived out of the thing demised, as right of Way.

Common. Be. Talk 120. Carth 232. 11 Mod

170. 1. Pow 238.

Quere in the deed is by Indenture? 1. Pow C. 238.

There is a diff^y in said between Express and Implied
Covenants, in construction. The former are more strictly
construed than the latter, as if one expressly covenants
to perform, a voyage in a given time, he is guilty of
a breach, in he performs, even tho' performance was
rendered impossible by causes beyond his control. He is

virtually *Indemnity* for *Lease*. "Contracts"

3 Bun 1637. 3 East 233. 8 TR 259. 2 ALR 258

See also I suppose, if the covenant had been to go a
distance of 1000 miles in one day or to do any thing
physically impossible under any circumstances.

1 TR 708. 310. 2 Ed Reg 1477. Ten 16. 350.

See D 270.

Is an absolute covenant to pay rent for a house, and its
implied covenants must pay at all events, in favour of
the lessor. *Prima facie* auth.

See also an implied covenant to pay for use & occupation.
The occupant will not be liable under such circumstances.

Where an lessee can receive the lease after the assignment
of the thing leased, he having covenanted absolutely to
pay rent?

In other cases like *Shover*. 519 This point not decided
in 18th case. The Chancellor's opinion was in favour of lessee.
See also was in favour of the lessor 1770. in the case of
de apply.

The subject is discussed in *Conli*. 306. 74. n. 1. See also
Spencer is in relief in Equity and his reasons are,
3 unstruck First that Equity cannot control the Law, but merely
657 administer relief from an attention to circumstances
18 2nd In of the Ct of Law can't take notice and then it proceeds
115 on the ground that the Rule of Law wasn't framed
138 for such a case.
TR 310. When Equity is equal the Law must prevail.

Note. Is in construction of intention of the parties or the
law has at all events, in good conscience. What
higher obligation is there upon lessor, to release the
whole lot, or upon lessee to bear his proportion

over the value of his Term. To decide these as Graves,
3 Anstruth 657, 18. Ves. 32.

In case of an implied Covenant, such accidents excuse
the Covenantor. As an implied Covenant for the quiet
enjoyment of a house, lessor would not be subjected for a
destruction of it by Fire. See. 1 Toulb 366.
Doug. 259.

Suppose the Covenant were Express would he be liable for
the loss? Does the Covenant extend to any thing in
the Title?

The amount of diversity appears to be, yet the Law don't
imply a Covenant as inevitable accident, tho' the party
may make one by Express words, and thus it seems
is the whole amount of the distinction or difference between
the responsibility of a depositary & managing under an
an implied & under an Express contract to keep and
restore goods. "Bailment"

Performance of Express covenant and discharge of an
implied makes no where there is an absolute covenant
to repair and if building is burnt.

Exceptions.

1. The Covenant is to a thing then destroyed, a defect
it makes it meaningless where the Covenant is annulled.
2. Covenant is inoperative. Talk 198. Co D 270.

Suppose now, a case falls under it etc. ... art Constitution
of U.S. which prohibits the passing of any law, impairing
the obligation of contract? Or deem not, the Law can't
be made for affecting the contract. The effect on the contract.

is merely the accidental consequence of a State of public safety.

If one covenants not to do a thing which is lawful at the time of a subsequent &c. compelled him to do it, & Court is repealed. *Ibid.*

It seems if an act was unlawful at a time of covenanting for the original Lawfulness, or unlawfulness, of the act can make no difference.

But if the covenant is not to do an act unlawful at a time, it is merely making it lawful don't annul a Covenant, for the *It* and Covenant are not inconsistent. *1 Sam 198.*

It is a General Rule that covenants respecting any particular subject are confined in their operation to that which is in being at a time of making the Covenant. As Court of Leases is, say, this lease, extends only to such kind, as were then in being at a time of the *It* of a Covenant, and not to those of another kind imposed afterwards.

3 *TR* 377. *Str* 1191. *Lev* 68.

A Covenant contrary to Law or good Policy is void. *though* this rule is applicable to all contracts.

If one leases a personal chattel to another, and covenants that the lessee shall have & use of it, for a certain time and it becomes useless for want of Repair, or is worn out during the term the covenant ant. broken.

Holden contra by 3 Judges. "Bailement"

who chose in action and assignee at & Law. yet they are often assigned & with assignor, if by deed, contain an implied covenant by the assignor. & the assignee shall have the benefit of it.

See Ray 683. Salk 125 Ch Bile 109. 1 Pow 307
1242. 2 Vern 540 2 E. Mm 608. 1 Mod 113.

If the assignor receives the money due or release, he is liable on the Implied Covenant.

The usual practice in Court is to sue the assignor, or stand in one name, to petition Chy. in the Petition, he knowing of the assignment it has lately been decided in Chy that the Petition went to the assignor of bond being sustained to him.

A Covenant in one deed can't be pleaded in bar of an action on a Covenant in another deed. in it is in the nature of a Defiance or release. is a Covenant not to sue a debtor for a limited time. 2 Vent 217. Ch D. 305.

But a defiance in a separate deed, may be so pleaded. The second deed must however appear clearly to have been intended as a Defiance, and must contain proper words of defiance, or declaring the first deed to be void in a certain event, or something of an Equivalent import. Cro D. 300. 623. Salk 573. 5 - Cro Ch. 426. 3 Salk 298.
Ch D. 306.

Seems to me, but in it be in terms of legal effect, a release, for defiance and Release, are framed for the very purpose of defeating the deed or claim to which they extend.

Hence a Covenant in a separate deed not to sue a debtor for a certain time is no bar to an action, but the covenantor by doing makes himself liable on his 4 Bac. 265.
Covenant. Cro Ch 352. 3 Lev. 41. 1 Roll 938 "Release."

The reason of the Rule is, if it continue a temporary release, it is not a bar, but a personal cause of action, which is not barred. 10. 2 H Bl 10. n. Carth 53. Talk 573 2 Pow 255.

It can't be a bar, as it is regarded in L. as a release, but a release is the extinguishment of a Right of action, and if it be extinguished for a moment, it is gone forever. 1 Lev 152. 8 TR 483. 6 TR 737. Ld Ray 690

But if such covenant makes part of a Instrument sued on (as by a memorandum under Seal) it prevents a right of action, till the time expires.

The memorial being in such case being part of a Instrument, the whole is to be construed together as Covenant to pay or demand with an agreement annexed or annexed, not to sue within a year. This is in effect a Covenant to sue after the lapse of a year.

Hence too a general Rule, if one covenant may be pleaded in bar of another covenant, in the same deed, with ⁱⁿ words of life, and the sense is to be collected from the whole deed, as a Covenant that Lessee shall pay so much⁺ rent, and one by the lessor, yet the Lessee may retain so much⁺ for repairs. 6 TR 737. 8 Do 483
1 Lev 152 Cb D. 336.

The above rule, yet a mere covenant not to sue for a limited time is no bar, seems to apply to Personal actions only. For a temporary suspension of a right to sue for Realty, not extinguished. For there are Gradations of Title to Real Estate in one and the same person. When he prevails on his ultimate Title, he is of course reinstated in those subordinate degrees of Title, wh he may have before lost. 2 H Bl 4.

But a Covenant not to sue at all, is a bar to an action *Pro B*
 on a Covenant in another deed. It operates as a release ³⁵² 2 *Buls.* 95.
 and may be so pleaded. 8 *TR* 170. 1 *DD* 446. 8 *DD* 486

This rule is intended to prevent a multiplicity of suits.
 to produce no and the same effect. For if the creditor
 should recover, he would be compellable to refund the
 whole in an action on the Covenant. Whereas had the
 Covenant been only for a limited time, only special
 damages could be recovered. 1 *TR* 446.

But a covenant not to sue at all one of 2
 joint and several debtors, is no bar as to the other
 nor as it seems to the Covenantee. 8 *TR* 108. 171.
Holt 178. 1 *Root* 72. *Ed Ray* 693. 11 *Mod* 254. 12 *Do* 557.

Tho a Release to one is a release to Both. "1st."

But a covenant in the last case, is not construed
 to be a release, because it is evidently not the intention
 of the Covenantor to extinguish the whole claim. The
 Covenantee's remedy is then by an action on the Covenant
 when it is broken.

If the obligation is joint only, the Court it seems will be
 a Release to Both, for here the intention must be to
 abandon all remedy, as one of the debtors can't be
 subjected alone. *Therif and Goaler*.

If one Grant is a debtor a covenant with him,
 yet he shall not be sued, before such a day and yet
 if he is, he may plead the Grant as an acquittance,
 and that the obligation shall be void, or that the debt
 shall be forfeited, it is a conditional release, for there
 are words of Defeasance.

A Consent not to sue in a foreign country is a good bar to a writ in a foreign country, and yet it is not a total release. As a release to local.

As a Consent by a Foreign Seaman, with the Master of a foreign ship, not to sue him in any other than their own country, is a good bar to an action brought by the former, so the latter here. Such a Covenant is reasonable and consistent with good policy.

La Rey
690.

11 Moa 254. Com R 139. 2 H Bl 603. 171. 3 Salt 298

The one can't by contract exclude himself from resorting to the proper Cts of Justice in his own country, it being in good policy. Hence even a submission to arbitration is revocable on this principle, tho' not precisely within the Rule.

2 H Bl 606.

Covenants used in Conveyances,

C. D. In all kinds of conveyances in Suit Claims, there are 2
266.68.
2 Moa covenants, to-wit: a Covenant to defend Title. 4 Co 80. b
92.
1 Roll 519 # of Covenants for good Title. II of Warranties, & for
520. Limit Conveyance.

There are 2 covenants they are implied from the word, "I will defend" in there is something more in the face of the deed than would be implied.

9 Co 60. If a Covenant of Title in for good Title, is a 'covenant to defend' it. That the covenant is raised in law
Cro 339.
C. D 299.
Curry 3. Good Title, a covenant is broken initially if not

In a covenant of Title, therefore, a Grantor may sue before Election - tho' enough to show, if Grantor hasn't properly acted.

In actions on Covenants of Seisin, it is sufficient to aver that the Def^y want seised, without stating who was. It is then incumbent on the Def^y to show ^{that} he was seised, and if he makes out a title *prima facie* good, yo puts y^e Plff upon showing higher title in another.

Esp D 299 (2 Root 17) 9 Co 60. Cro D 369. 170
^{contra}
 not Law

A covenant of Seisin is broken by an existing incumbrance in the Excepted.
 3 East 491. 4 John 10. 7 Do 376.

Is he liable if he takes up y^e mortgage after a Covenant of Seisin is executed, and before action brot? most certainly? A broken ^{covenant} can't be mended by any act "ex post facto"

But in such case a breach must be said especially, showing the nature of the Incumbrance or Interruption, for y^e Covenantee takes the ass. and burden of proof, and ought to allege the fact ^{that} the covenantor may have precise notice and be able to reverse precise.

2 Mass 433. 37.

II. A covenant of Warranty, or for quiet enjoyment is a Covenant "de futuro" i. e. that the covenantor will warrant and defend y^e the covenantee shall quietly enjoy vs all persons.

Note Both these Covenants of Seisin & Warranty are strictly Personal Contracts or covenants entitling Covenantee to damages only. "Seea" 30, 4 Cruise Dig 49. 50. 56 2 Bl 304
 1 Ves 571

But they are often called Real. The old Covenant of Warranty was a Real Covenant, for on it the covenantee wd recover lands. But that is out of date. & a new covenant called a "Covenant of Warranty" is now in use.

On such a Covenant therefore y^e Covenantee can't sue till possession.

4 Co 80.6
1 Mga 292
Cro C 315
Cro C 317
Ep D. 301.
2 Lunda
177.

And it must appear in the declaration not only that
of Boston was under claim of title or law's right,
but also that it was under good and elder title.

alleging lawful right and title in the erection and
satur. For it might be derived from the City.

2 Lunda 177.

It must appear, yet the Erector had elder title. Hence
alleging that the erection was by City, and enough.
This indeed and averring any title in the Erector.

Cro C 317. 4 Co 80.6. 1 Pow C. 379. 88.9.403.4.

But if it appears that the erection was under elder title,
in the dec^d. it need^{not} be formerly stated to have been so.

Ep D. 302.

8 LLR 78.4 So 616. 2 Lev 37.

But it is not necessary to state under what title the erection
was.

"extra" 4 LR 614. 2 Lev 37.

It is said in 2 Lunda 177. 1 Sidney 408. that the City
must show what title. This and Law. in showing what title
means any thing else than alleging good and Elder title.
and probably nothing more is intended by the Expression.
yet the City must show good and elder title in the Erection.
The words in the case, "legati sui et subdani" do
not show elder title is clearly ill.

The reason why Boston must be stated to have been under
elder title is, that the covenant of Warranty does not extend
to the Tortious acts of others. They themselves are liable.

For 400. 4 LR 619. Cro. 34. 3 LR 584

Ep D. 273. 301.

But one may covenant or Tortious acts of 3d
persons and then the warrant under "good and elder title"
is not necessary. Ep D 273. 4.

And a covenant as the acts of a Tortious person, extends

to Tortious Erection by that Person. This Rule is founded on the supposed intention of the Parties. Hob 95. Cro E 212.

For 400. Cro E 274.

And there is this a Reasonable interpretation of the Covenant.

If a covenantor himself disturbs the grantee even by a Tortious act under claim of Title, i.e. by such an act as appears to be an assertion of Right, he is liable on the Covenant for Quiet enjoyment, and Plff need not state if the Def had any Title or even that he claimed any, if the fact appears from the Deed to have been an Assertion of right.

1 R 671. 1 Roll R 21.

2 Show 425. Cro E 302. 273.

This Rule holds even where the Covenant is expressly confined to Lawful Erections. For the covenantor cannot defend himself by alleging his own act is unlawful.

Erection by the Lessor, suspends the Rend. Secus of a mere trespassing act. for the latter is no breach of a Covenant, as it avirt not the Lessee's enjoyment or possⁿ. Coep 242.

The same Rules that apply to Tortious Erection by the Lessor, hold also where a Tortious Erection is by any person included in the Covenant, as Tenants, Coten^s &c of the Lessor.

Cro E 302. 1 Roll R 121.

Dyer 257. 6

So that the heirs are named in the Covenant.

Ibid

A covenant by Coten^s &c as such, for Quiet enjoyment,

is restrained to themselves and persons claiming under them.

Hence a subject them on a Covenant, a breach must be

committed by or in consequence of some act of a Coten^s and themselves, because they covenant and of course can be made liable only in their representative capacity, and in that capacity they must be considered as

1 R 671
34.

as assuming the Vendor's right only, whatever it may be.

The Rule of damages in a Count of Trespass and Warranty are different and the Rule as to the latter, is different from the English.

Reply 3. In a Count of Trespass the Plaintiff recovers the Consideration and the interest from the time when it was paid or given interest to him. 4 Mass 108. 1 Selw 557.

1 Root 108. 2 Do. 294. 4 Dall 45. 4 Johns. 1. 5 Do 49. 2 Mass 433. 45.

The time when the Consideration is paid or drawn interest to him is when the Count is broken, or when it is delivered.

In a Count of Warranty in Conco he recovers the value of the Land at the time of the eviction and the damages of eviction i.e. the value at a time when the Count was broken and the damages.

Does not this the correct Rule especially in new Settlements, where the value changes? This doubtless the best Rule here, where the value fluctuates. But the Eng Rule then

Ally's fees are taxable
Secur Counsel.

In a Count of Warranty in Eng. he recovers Consideration and Interest and all his damages in being evicted, & the costs of his Sedit. by wh he was evicted.

Does not he recover Counsel fees? 4 John 3.

3 Barnes 111

Reply 3. But he recovers nothing for the Improvement or increased value of the subject. As A buys Land to day for 1,000 per acre. and is evicted 50 yrs. hence & Land being then worth 50,000 per acre. he recovers nothing for the increased value. The Rule is the same in 1 York.

Reply 3

2 Mass 440

3 Do 543.
540

He sha recover what he has lost on a Warranty,
and that is the same at the time of losing.

In a Covenant of Seisin y assignee of the Grantor,
cant maintain an action vs the first Grantor, for
the Covenant was Broken. at y moment of Ex. If course
the right of action accrued. fore assignment. and a
right of action cant be assigned.

Bull N.P. 158.9. 2 Mass R 439. 2 John R 1. Ex D 382

Bull N.P. 158-9

Contr see 4 Maul & Selwin. 53.

Seisin on a Covenant of Warranty.

Bull N.P. 158.9.

Co Litt 384. b. 5 Co 15. b. 17. a

Ch Pl. 31. 3 Co 223. 3 John 347. 5 Do 120-

If the Broken in the term of y assignee, he may sue on it.

Sup.

But an intermediate assignee who has not been
damified either by Eviction or by being subjected or
sued by a sufficient assignee, cant recover vs a
prior covenantor. for if he ex. a covenantor might
be subjected several times. 1 Comt R 244.

Ed not the first covenantor recover on the covenant of
Seisin, at least nominal damages, since the covenant
is broken in his time?

In an action on a covenant of Seisin, y Def having
acquired title after action brot. is no defence. For the
cause of action was complete before. But this wd
go in mitigation of damages. This wd not bar y action -
2 Saund 171. 3 T R 185. 4 East 557.

If seisin is brot by one claiming Elder Viley, as Gt R
Grantor y def ought for his own security, to notify ²⁸ 2 R
his Warrantor, ut he may appear and defend. This ^{305.}
when the Interest in Question is a Freehold is called ^{Co Litt} 10. 305.4
Touching in the Grantor. If Warrantor dont appear, ^{Dea Evi}
grantor must defend as well as he can. - 31-

This is a practice in Court in Scotland as well as
 in France.

In the touching in is only in these actions.

The usual mode of giving this notice is in Scotland, by
 a Writ of Summons, called a Writ of Touching

If the warrantor is not vouched in, he is not concluded
 by a Judgment as the grantee. See if he is vouched.
 Gilb. Ex. 28. Gels. 22. Pea. Ex. 39. Roll 396.

Quit claim deeds or releases contain neither of the above
 covenants, yet in some cases the Quit Claimant, may
 it is said in Com. be answerable for defects in
 Title or Quality in an action on the case for Fraud.

And the purchaser must protect himself, if at all
 by requiring all necessary covenants, for that purpose. Co. Lit. 35

2. Cairn in a country like this where wild and distant lands,
 183. are unknown to the market, don't police require that the
 1 Day 38. action should be answered. I G. Mink So. Com. J. action
 I 55. Decret. a. l. 8. 1 Lomb. 355. Crui. D. Title 32. Ch. 5. Fac.
 Falk 211 The same opinion in Eng seems to be, yet the action will
 Cr. J. 196 not lie there. But there are opinions there, yet it will lie,
 385. 3 L. R. 57. if the Plot is disappointed in the quantity or quality of
 La Hay land. 2 Day 128.
 1118. 16. Actions were often brought here during the Speculations in
 Land. 2 Day 128.

Release here is an unfortunate word, for it has a different
 meaning. The Quit Claimant claims no particular title.

Of Collateral Covenants and those which run with the Land.

A covenant is said to run with the land, when the obligation created by it, passes on assignment of the interest, so as to revive when the assignee.

Those which do not run with the land are ^{called} collateral.

Hence a distinction arises as to the assignee's liability in the event of the assignor.

If the assignee of a lease is liable for breaches occurring during his term, tho' not named, if the covenant runs with the land. See if the Covenant be collateral, 1 Lon. M 345.

And where a thing covenanted to be done, or concerning which something is covenanted to be done, was in "esse" at a time of the ^{lease} ~~term~~, and has since the demise of the term, then the lease runs with the land tho' the covenant is made by the lessor, buildings ~~demised~~ demised.

In the last case the buildings are in esse, and part of the subject demised & it follows it. Hence he said to run with the land, tho' the assignee of the lease, is bound by it, so far as he is liable for breaches occurring during his term.

So a covenant to pay rent, tho' tho' not substantially, is potentially in esse, (since the subject of it is in esse, is actually so) is a covenant which runs with the land or is annexed to the estate. Cro E 383 B AP. 159.

1 Bac 531.

By such event, then the assignee is bound, tho' not mentioned in the event.

But if the thing covenanted to be done is concerning the
 use not in issue at the time of the covenant, or not the subject
 of the demurrer, covenant don't run with the land
 and is of course collateral. 5 Co 16. 3 Burr 1271.

3 PR 343. Cro E. 552. 1 Bac 534.

The assignee is not bound by it, if named,
 and not in all cases the named. Thus by a covenant on the
 lease, waste to build a wall "de novo" on the land, the
 assignee will stand in named.

The covenant is collateral. Collateral it don't run with
 the land, for the thing was not in issue.

But a covenant runs with a land, if it goes to the
 support or preservation of the thing demurred to. Covenant
 to repair as before stated. The assignee is bound to
 repair tho' not named. - Infra.

5 Co 17. 18
 24. lb.
 2 East 580

So by a Covenant to leave so many acres yearly within
 ploughing. Cro J. 125. 3 Lev 233. Ray 303. 1 Lev. 215. 2 Bond 228.
 These do run with the land, for they go to support
 the thing demurred and bind the assignee tho' not
 named. It is concerning a thing in issue, and for the
 benefit of good Husbandry. 2 East 580. Cro E. 222.

And on a covenant which runs with the land, if the
 nature of those case supposed, an action lies for
 the assignee, if part of the land. As for not repairing

there. Is the title universal? suppose a covenant for Rent.

5 Co 16. 6.
 1 Bac
 534.

When the assignees are named, they are obliged in
 general to perform all the covenants, as they run
 with the land or not. As covenant by the Lessee,
 for himself and assigns to build a wall on the
 land.

But one covenant in these cases must be to do a thing which relates to the demise, ~~as~~ ^{and} as assignees are bound, tho' ~~not~~ named.

For the assignees are not bound, tho' named by a
Covenant, to do a thing which is not done concerning
demise as to build a house on another's land, or
to pay a collateral sum. It is a distinct sum, ^{or} is
is no part of the Rent. 5 Co 16. b.
1 Donb 352.
Cro J. 438.
1 Bac 334.

Here the act to be done is collateral and the assignee
is a stranger to the Covenant, for it don't concern
the demise. And it is in effect the same thing (in
regard to the assignee) as any distinct ^{personal} contract
in a separate deed, executed by the Lessee. As Lessee
promises to pay rent, & a debt of his own banding
of it.

5th

But where the assignee is bound by the Covenant
he is liable only for breaches occurring during his
term. If the Breach was before, resort must be
had to the Lessee, even tho' the assignee was named,
for the assignee is bound only on the ground
of ^{possession} and ^{possession} of estate, or priority of ^{possession}
Doug 443. 1 Donb 356. 2 East 575
Kolt 177.
Salk 129.
3 Barr 127.
1 Pd R 388.

On other words, he is bound by Covenant only, because
he takes the Interest to which they are attached, &
since his liability is, exclusive or coexistent with
his Interest. As Lessee Covenant to build a house
within a certain time and after the time not having
built he assigns. There then is a complete right
of action vs Lessee, and his liability continues, tho'
the assignee isn't liable. CasM 177.
Doug 775.
1 Donb 350-

There is a Privilege of estate where one estate is so incident to another, as to make out one and the same Estate in Law.

So the assignee is not liable for a breach at law, after an assignment by himself.

Bull N.R.
159.

If he assigns the land, and the Rent becomes due, he is not liable for any Rent, for nothing is due till the day of Payment, and there can be no assignment of the Rent.

Doug. 461. 4 Mod 71. Pow M. 90. 3 Co 22. 1 Ta R 81.

1 Broom T.R. even tho he assigns to a Beggar, by fraud, or a bond, or a deed, or a power, &c. in the assignment is merely voluntary, to avoid liability, for it is then a mere fraudulent conveyance.

Bull N.P. 159.

Rob. 72. 166.

329. 31.

Contra 1. Rent 321. 39. and that fraud may be relieved, as not such a Reformation, &c. if he assigns, continues, or holds, or makes a lease, or a mortgage, which is fraudulent.

So if he assigns to a Term Court, for he is liable as before stated, for Privilege of Estate, not of contract. The liability follows the Estate, not the person of the Assignee. tho it does the Person of the Lessor, for he is by Privilege of contract. whatever may become of the Estate, not so of the Assignee. 1 Ta R. 357. 53. 1 Broom 165. 87. 8.

But Chy will compel the Lessor to pay the rent, while he enjoys the Land in these cases.

An Chy will under any circumstances restrain the assignee from assigning to an Insolvent Person.

2 Ch 219

Lord
357.

There is no reason on the point, tho restrain him at any rate, if he offers to surrender to the Lessor, and he will not accept, for it may be a very disadvantage.

If the assignee is evicted of part of the premises, the rent may be apportioned at Law & contract with him, being legal. Real, and Privy of Estate the ground of liability. 2 Case 575

Note the difference between this case and that of assignment before day of Payment. before any rent is due in the latter it continues as to part of the Land till the day of Payment.

2 Case 575. 3 Co 22 a s.

Co in debt vs Lessee himself, in a Court vs Lessee, for is founded on Privy of Estate.

Recess in covert Broken, for an action of covert Broken is founded on Privy of Contract & an entire claim founded on Privy of Contract, cannot be apportioned -

Covert by Lessee not to assign is binding, tho' formerly this was doubted. For A may be willing to lease to B, tho' he will not to C. 8 T R 800. 57. 00. Coups 803. -133-

Such covert not broken by the Lessee's creditor, taking a term in part for the covert contemplate, only a voluntary assign by contract. 8 T R 57. 2 Eqy C 100

Stale 483. 3 Mils 237.

Nor is such covert broken by an Underlease of part of the Term, for it is no assignment.

Nor by demise of the Term. for on the Lessee's death, it must pass to his representative or Legatee. 2 Bl R 700. 8 T R 59.

3 Mils 234.

The Lessee continues always bound by the express covenants even after assignment by himself. for the contract binds whatever may become of the Estate. 3 Co 22. 3 Popl 120.

1 Salk 199. Doug. 443.

4 T R 98. 100 Pow M. 91. 1 Ton 635. 4.

But if the Lessee has accepted of Lessee's assignee, as his Tenant, as by receiving rent from him, he

Cro J. 334. after maintain debt for rent vs Lessee, i.e. for rent
 accruing afterwards. In the privity of Estate between
 1 H Bl 444. 439. lessor and Lessee, is gone, upon wh debt for rent
 3 Co 23. is founded.
 a. 3. 1 Donbl. 354.

Yet if covenant be Express. he may have an action
 of Covenant Broken, for the subsequent rent, vs the Lessee,
 for the privity contract. it being Express, still remains
 and Covenant Broken. is founded on yr privity of contract.

Cro J. 309. 522 1 Donbl 354. Bul A P. 109.

Cro Ch. 188. 1 Panna 237. 1 Seliv 402.7.

But if the covenant is only implied ^{one} by Law, y Lessor shall
 Cro J. 522. not have any action, even an action of Covenant Broken,
 1 Seliv 447. vs the Lessee, for any failure, after accepting the
 1 Panna 241. b. assignee, tho' he decus might. such covenant being
 3 Co 22. a founded on privity of Estate. wh tho' the Lessee alone
 1 Donbl 354. can't alone, destroy, yet both Parties by their concurrence
 1 SE 36 or several acts may.
 437. 9.

Lessor may accept the Lessee's assignee, by receiving
 rent, by assenting to the assignment. or by any act coming
 such assent. either Express or Implied. 1 SE Bl 438. 9. n.

Cro J. 523. When the covenant for rent is Express. so that the Lessee
 liability continues. y Lessor may pursue his remedy on
 the Covenant vs the Lessee & assignee at y same time,
 but only on each can be enforced, ni for costs, of suit
 for each has been in fault for not paying before.
 After satisfaction of one Court, if the Def in the other
 is taken ni for costs. "causa querela" lies.

By St 32. Hen 8th a grantee of a Lessee has y same
 remedy. on a covenant running with the Land as the
 Lessor himself had, at y C Law. The C L. extended

remedy only to the representatives of Lessee.

By the time it is in the other name of Lessee has a
same remedy as the Lessor Grantor, as he had before
as the (Grantor) or Lessor. 1 Smth 345. Co Litt 215
Cro J. 522. 3 Co 22.

Difference between an assignment and Under Lease.

A derivative lease or under Tenant is one, who takes a
conveyance of only part of the Residue of the Term. as
4th interest for one year, where the unexpired term
is 2 years, or as Tenant to the Lessee of the Whole Term.

Doug
174
Str 435

As between him and the Lessor there is no bond of estate,
since the Derivative Lessee is as between himself and the Undertenant,
a lessor & holder of contract ^{between} and under lease under
from holding of Estate only. 3 Will 234. 2 BR 166

Since a derivative Lessee can take at will on the ground
contained in the lease (1 Selw 575. Doug. 187 not Law)

1 Smth 347. 8. Doug. 438. 174

The Rule was formerly held to be the same as to Mortgagee -
of the whole Residue, and he took safe. for there is said 14 BR
to be no bond of estate between him and the Lessor. since 114
he takes only one Incumbrance, and not strictly a
Purchaser of the Term. But this there is now said 160
to be Law. 1 Ves. Sm. 235. "Mortgages 2d"
Doug. 438. 3 Br 366
156

It is said by a third taking of whole Term to secure a
debt, as Lessee, is an assignee. But you don't seem
to be correct in saying so, for the third usually
has no interest further than the Security of his debt,
and he takes, safe & he usually does not.

The difference between an assignment and an Under Lease is that
in the former is the sale of the Lessor's whole interest in the Term

The latter is a creation by the lease of a tenancy, and the assignee is tenant in the original lease.

See 400 3 Mils 234 2 P 36 (E 400.
400

Assignees of the whole term are liable on the covenant according to the preceding distinction, on the assignment of the whole or by sale under 222 or other mode of transfer by operation of law. Doug 177 Cowp 700.

In the assignee of part of premises liable for Rent or any part of it. Cro E 633. Cowp 700.

Can it be abridged? It may seem by analogy to a case of warranty being made of part, yet there may be an exception. See there.

At any rate the lease remains liable for the whole.
2. Part 577 analogy. Cro E 633.

If the lease covenants for himself and assignee so long as they shall be in possession. If the assignee in possession of the term, he is liable on the covenant. He is not then strictly an assignee: for being an assignee "de facto" he can be liable as such.

Stile 407.

Co. 558

1 Mils

118

1 Mils 80

St 510

824.

Covenants to pay by Instalments

In a bond with condition for the payment of an agreed sum, at diff. times, etc. etc. for the first week, and at 5 Ls the whole ^{penalty} personally is liable. Recoverable 4.

See A P 168. Ep 205

In a single week is a forfeiture of the whole Penalty
contra e. 118 x 4. b. 232. b 10 Co 28. 128.

13. See authority above on single 2 Ls. See A P 168

On a Single Bill of action of debt, which is the only proper action, lies not till the last Instalment is due, for debt is entire and indivisible & non Payment of one Instalment will accelerate the others. Co Litt 47. b 292. l. 18. Co 28
 Bul N P. 108. Eo D. 205.

By a Bill of Account for bringing actions on Penal Bonds with condition for several Payments of P^{ty}. recover only his actual damages. & may have a Bill for "Totes Quoties" The proper mode argo is to render judgment for the whole Aggregate of the Instalments, and to issue successive Bills on Bill of Account for the subsequent Instalments as they fall due.

Rent is payable for, when part is payable at 100 L. 10s. per annum. payable quarterly, an action will lie at the end of each Quarter, for this is considered as a Reservation of that part of the Issues of the Land, which shall have accrued on the day on which the reserved There is indeed no debt until that time but the different Reservations are in the nature of distinct debts. The debt is Entire at the end of each Quarter & per annum is inserted only to fix the Rate or ratio 10 Co 128
 3 Co 22.

On the covenant or note for payment of an Aggregate sum, by Instalments, an action of account Broken or apt for Damages, will lie when the first Instalment becomes due, Eo 205 but it lies for that Instalment only. & is Totes Quoties. 10 Co 54 for the recovery of each Instalment. Eo 118. Co Ch 175
 Salke 165- 3 Co 22. a 4 To 94. b. 8 To 153
 But debt on the covenant lies ^{not} till the last is due.

For there is a difference between an action of account on Bond, on the one hand, and the action of debt on the other. in this, as the former is to recover a sum, the

But the latter a sum certain "in numbers" In the former ¹⁶⁷ the Plaintiff may recover damages, surdamer. On the latter he can ²⁶² recover nothing, till the entire aggregate sum is paid payable.

There is a covenant to pay several sums, at diff^t times, and not an aggregate sum, in several Installments, Court Broken will die for each sum as it falls due.

They are in the nature of Several Debts.

Must debt be one cash? I can see no objection to it. The several sums appear to be in the nature of several distinct debts, like an annuity & the rule it seems is the same as if they were cash in a Separate Instrument.

Exo E 706. 807. Exo E 118. 1 H R L 550 But N P 158—
And debt will lie on a covenant in a deed, to pay a sum certain or a sum that can be reduced to a certainty by ascert.

The Rules laid down as to Courts apply to Juries.
Juries Provides. 12 unsworned contr. Co Lile 202 &
Exo E 807. 1 H R L 528 1. H R L 548—

A clause in a covenant or in Non Payment of any one
Ch Bils 212. 13. Installment, if whole shall become due immediately, is good & seems. Must such a clause the Plaintiff can recover only those who have become payable by the terms of the several periods appointed for that period respectively
(Exo E. 508. Contr)

In Covenant Broken any number of Breaches may be assigned, After at Law, in Debt on Bond. The breach being a forfeiture of the whole Penalty. It is clear more, under duplicity. 2 Vent 198 2 Hill 293.
3 Salk 108. 1 Rolle 112.

But as the Court is enabled by Law to change Penalties, a P^{ty} in an action on a Bond may assign any number of Breaches.

If a bond is given for 100 Dols. payable by 100 Insurers, and all have become due, he must allege all the Breaches, in debt, and the C^t will render Judgment for the damages sustained. This is since our debt allowed debt to be apportioned on Bond.

And now by Sec. 8. J. 11^m 3^d a P^{ty} may allege as many breaches as he pleases, in action on Bond, in performance of Covenants, and therein recover only his just damages, not the whole penalty in the damages are equal to it. 2 Wils 347 8 J^r 459.62 Cowp 407
2 B^r R 1016. 114. 1111 "Pow Chy 33"

The Rights and Liabilities of Representatives

General Rules. The C^t of the covenantor are included in himself and bound with naming.

There is an Exception where the covenant is ^{to} ~~fiduciar~~ ^{to} ~~as by~~ a Master to instruct an apprentice. Here the C^t are bound to instruct after the covenantors death.

But they are liable in the last case, if the covenant was Broken in Covenantors lifetime.

So an Ancestor seized in Fee may bind his heir by Covenant as a Court to sell land, and die before conveyance, his heir may be compelled to convey and the purchase money will generally go to the C^t specifically, if the Personal Property is satis for debts. This is a Covenant Real.

It is a General Rule at Law. that covenants Real bind
the heirs of the Covenantor.

And also descend to the heirs of the Covenantee.

As to his Personal liability in Personal Court see "Deed"

And the Heir of such Covenantee may sue on such covenant
tho not named, for a breach after the Testator's death.
As a Covenant with Lessor, having an Estate of Inheritance
to leave the land in Repair. In this case the Lessor's
heir may sue for a breach committed after the Lessor's
death.

If a covenant with B. his heirs and assigns for quiet
enjoyment of an Inheritance and the covenant is broken in
B's lifetime, his Ex^r tho not named, shall have
an action for damages, and as they
accrue in B's lifetime, they belong to his Personal
fund. Beside the grantee being covenanted, there need be
no heir to the Land.

If a covenant Real or relating to the Realty is broken
after the Covenantee's death, his heir must have the action.
The right violated is then his. As Grantee's heir is covenanted
He may sue on the covenant of Warranty. This tho called
a Court Real and strictly so -

The Covenantee's Ex^r tho not named, is always liable
for a breach in the Covenantee's lifetime. As Grantor's
Ex^r for a right to damages, accrued in his time, a
recovery at that time wd have diminished his Personal
fund. A claim to damages is a claim to recover
fund.

The action will also lie on Covenantor's Est., tho not broken till after Covenantor's death & altho the Est not named. if the Covent is Express. For if Express, y action is founded on privity of contract and that privity extends to the Personal representatives of y Covenantor.

But on a Covent in Law. (in a lease or Grant) by the Lessee, or Grantee, not broken till after the covenantor's death. the Est not liable. As on the covent Implied from the words *dedi et concessi* for the right of action is founded on privity of Estate. and the Reversion is in the heir, so that the Est not in privity.

But if the Reversion were itself a Chattel Interest y Est & I think, wd be liable on such a ^{Covent} contract. Covenant.

If the Est do come into the hands of a Lessee, in their representative capacity, they may be considered as assignees, and such as such for breaches during their hands. They are virtually Assignees by operation of Law.

The heir of y covenantor is also liable for breaches of Covent, even of Personal Covent, accruing either before or after Covenantor's death, if named, and if he has Real Assets, i.e. assets by descent from the covenantor & not Secus at Law.

As on a covent of Person or Warranty or for payment of money.

In an action on Covenantor's heir on a Covenant

running running with the Land, in any is no bar, and he may be sued either as heir or as assignee of the Reversion.

That the Heir is liable at Law. there is no doubt.
1. Dents. 70. 347. 1. Com. & P. 39.

Covenants or Bonds to save Harmless.

A covenant to save harmless is one by which a Covenantor stipulates to secure or indemnify the Covenantee or some damage, or loss or charge, to which he may be exposed, as bond by the Principal to indemnify his Sureties Counterbond

1 Co 80 Covenants to save harmless are not broken by the
Cro Ch tortious acts of another as in Covenant for Quiet Enjoyment.
443
1 Mod 219 An assignee to save I Covenant as to rent. and the
Lok B. 301. lessor's goods are illegally distrained, y assignee is
2780. not liable.

Focus of it is on the act of a particular person.

In a covenant to save harmless a Covenantor, may in some cases maintain an action on the ground of his own mere liability is a Suit at Law. when mere liability is only damages complained of.

This is the case only when his liability accrued after the Covenant of Indemnity was ~~gone~~ given. Thus if a Sheriff takes a covenant or bond to save himself harmless vs all damages. He is for the escape of one having the liberties of the Prisoners, and the prisoner escapes, he may sue immediately on the ground of his own liability and need not wait to be sued.

1 Root 507

2 Buds. 234.

J Co 24. a

Sam 196.

1 Bern 190. 1 Madrox Chy, 183

2 SR 104 5-

It not indicated about me in this list. It seems not
to have been indicated for me in the list. 7 J.R. 269.4. to 182.

7 J R 269.4. Do 182.

the base of the column. A column of water is shown in the
 on the right. The water is shown in the column. 2

2 H BC 41

Could not express. But even in the future, there is no more of the
the substance of it, and that substance is the substance of the
state. The person or substance is the state, and the state is the
it of substance that no substance of the future.

It is a general uncertainty as to when it will be
examined for many months in England.

But in our morning session, however, as I say, we
went on to the continuation after his death, but without
no more action seems the usual demonstration,
as it includes a single bill as a single bill, a bill
of indemnity or only the same as a bill of indemnity.

condition taken, for if it were not the case, it would be absurd, for the Debtors would be immediately liable upon the Bond or Surety, and thus the security is a future damage. 5 Co 24. a. 1 Pa M 156. 2 Buls 23-4

1 Root 507.

This distinction is founded on the supposed intention of the Parties in the 2 cases, to show the construction of the

Words / Considered before condition taken.

There is the same distinction in case of a Bond or Surety & Indemnity to a Surety, or a note payable on demand, it is already payable and the Surety is liable to a Bond of Indemnity.

If a Surety having taken no bond of Indemnity says the debt of the Principal, he may maintain "Indebita, Repetit." for money paid, laid out and expended. (The formerly held Extra) Coups 525. 2 TOL 104.5.

But if he has taken a bond of Indemnity, he must sue upon it, it being his higher remedy.

3 Mily 13. 282.340. Coups. 525.7. 1 T R 599. 3 Mily 13.

But where no bond of Indemnity, more liability does not give an action. The action being for money paid laid out and expended, it must be till payment by the Surety is made or equivalent to it, for he then only implies a contract to reimburse the Surety.

Co Sureties.

The same rule exists between Sureties for contribution. There is that part of the whole debt, or more than his proportion of it, and accordingly to take recovery, until he has paid the whole debt.

2 Bos Tr. 208.70 3 Bos 235.

Principal than In 118. 2 Bos 432. 1 Bos 465. Bos 466.

So the the Sureties are bound by General Indemnity.
See also Mass. Ins 118.

In Court if the issue dies during the term of breach
of his Covenant happen after the time of subscribing oaths,
has expired. The Court is a little weaker and the Court
will be more for such cases, by taking bond of the
Distributors.

Where he has taken no bonds, they will probably
give him Relief. (Cancelled)

Where there are more than 2 Sureties, a proper remedy
is in Equity, for it saves a Multiplicity of suits. For at
Law, must bring an action vs each Surety, for they
are bound Severally. "See 19"

Of Releasing of Covenants

In cases of obligation and choses in action in General,
a Release after assignment by assignee, is in some cases
good, in others, not

The General Rule, is if the Instrument creating a duty
is not assignable at Law, a Release after assignment
is good. as... Note not negotiable, & negotiable Note.

Since if the Lessor after assignment of a Reversion reverts
to the Lessee, all counts &c. yet the assignee of the
Reversion may recover for the breaches occurring after
assignment, for the event runs with the Land and is
assignable, since the L. is on 8th and according to some
authorities, not so, at Law. 2 Lev 200. Croch 503.

1 D. R. 345 + 2 B. 272 Release

But where a lease has been assigned by Lessee,
 as it is holden may not the assignee of all remedy
 be in the lessor for breaches occurring after assignment
 by a release before action B.R. 361.503
 & Rolle
 C. 2. 578. by a release before action B.R. 361.503
 where as to this issue, it is agreed in Principle
 that now the rule differs from a release by lessor
 after assignment & breach.

But a release after action brought by Lessee, assignee,
 is not operative, for the Right has attached to his person,
 as Covert by lessor to repair. Assignment by Lessee
 & subsequent Release omitted.

of covenantee vs covenantor

12th May 05
 Co Litt 132.
 10th May 05
 Cro. J. 25
 2nd 176.
 Release before count Broken of all demands, don't
 release the covenant, for there is no demand at the time,
 as Rule of Count of warranty. C. 2 307. Qui 100

So of a Release of all actions, suits & damages.

Lease of breach has accrued, before the Release given,
 as to that Particular Breach.

Note that the Rule extends to an absolute count for the
 Payment of money only? But that create a debt
 in Present? So I conceive and so it must be
 discharged by the Release.

But a Release of all covenants given before a breach
 is a bar to an action upon it, for it destroys the count
 La. Ray 578. Co. D. 307. Cro. J.

Of Joint and Several Covenants.

Of 2 persons covenant jointly and severally in and to each other, so such as a separate action shall be taken against either only, they shall be bound together.

2 Bern 99. 3 Gd. 12 303.

Suppose there are 3 or more co-defendants. If they
several jointly and severally, all may be tried together,
or one may be tried alone, or each in several actions. But
no one must be tried alone. The Court must be
created as judges, or as a Justice of Peace. 3 & 4 Geo. 2. c. 28.

3. 782. 400 20. 500 238

This Rule is common to all contracts.

But if 2 only & 3. are used together, it must be
treated as it between them and as between the 3^d
and them as well, &c. & being it and partly inverse,
a thing unknown to the Law.

There are two or more of covenantees, signed and all must join in an action in any court. Term Sep^r 1800. 25. 282
25. 140.
5th 18. 0.

This is also common to all continents. If all soil were
to man, we should be in a dilemma - on the one hand,

In such cases if one is dead, his lost or want want
one, the entire remedy, however, is the surviving community,
and he is subject to account with the persons only
of the deceased. for their proportion of what he receives.

Bar Fin 440. x 50.8. x. East 437. In E. 125

where one counts with 2 or more B's, and usually,
as with "one" & "other" each of them" the same number,
may in some cases, and alone, in others all three join.

The Rule is. if where a interest is a covenant appears to be several upon the face of the Instrument, each may sue severally the demise by one and the same deed. 13 Co. 100. and 13 Co. 101. and also covenant with self and each of them as to the whole. Here a interest is a covenant, being several, action on the covenant is to be brought by each alone. 5 Co. 18. 19. 8. a But N.P. 107.

1 Curia 103. 2. 20. 110. a 6. 3 Leon. 100. Yelv. 177.

Bro C 729
1 Ch. 72
.5.

as on a bond or covenant for 100 Sh. it is equally divided between them A and B are to sue severally, or each may sue alone. because their interests are several. And each may declare in the bond as made to himself, without naming the other, this being according to the legal effect as he may declare upon it as to A and B several. It according to the form of it. 10. 809. Bro C 729. Curia 832

But if the interest is a covenant, appears to be Jo, they must all join in the action. Thus if BL are only is demise to it and 200. a lease covenants with each, and the interest of the Lessee, being Jo. both must join in the action on the covenant. 5 Co. 9. a.

of Bacon

1 East 404. 1 Jac 332. Title 'Covenant'

5 Co. 12. a. since it appears. that the obligor is covenanted in one and the same deed, may sue themselves severally for one and the same cause, yet obligor or covenantee, can't have several rights of action for one person can't be subjected to 2 suits for one and the same thing.

as a person is not obliged to do the same thing, as it only.

If a covenant jointly and severally each may be sued

alone for the neglect of the other, and the one sued alone
has not been negligent. For 553.

And a recovery of judgment by one, is no bar to an
action by the other. 6 Co 46. 3 East 257.

Bro J. 73. 4.

So taking the body of one or Co^{rs} is no bar. But actual
satisfaction rec^d of one is a bar. 5 Co 80. Chit 23. 182. 124.

If one of two Jo obligors Jo dies, his Co^{rs} Jo are liable
at Law. The entire liability survives, or the surviving
obligor Jo. But if the surviving obligor is Solvent,
Co^{rs} Jo may be subjected in Equity. 1 East 400. "Title Pleading"
-23-

Seems if the Covent be joint and several, for the Covent
is in the nature of two distinct agreements.

If 2 promise or Covent Jo by a Severally it is construed
conjunctively - as and. Seem. but be uncertain
as the Covent were Jo or Several. Cowp 832. Kid B^{ro} 1806.
16 76.

If several are bound Jo by and severally and one is
made Co^{rs} by the covenantee or assignee, y obligation is
released at Law.

So in Chy as respects of obligor's representatives, but not
as Creditors and Legatees, of the obligor For it is only
in the nature of a legacy. (i. e. the amt of the debt.)
Is the obligor appointed Co^{rs} & a Legatee is postponed
to creditors and such an Implied legacy is postponed
to other Bequestes who are Co^{rs} persons.

If an Instrument begin with the words "I covenent" and is signed by one only, he may be sued on it, it being in legal effect but his sole obligation.

1 Barn 323. 2 T.R. 32.

2 Str 46. If an Instrument recites, I & B covenent
2 RR 47. in one part I & B doit covenent, & covenantee may sue,
1 Barn 323. A and B alone, and does that & doth covenent.

There is there any need of such doctine? I think not, if instrument being in legal effect, I act of A and B only. The insertion of C name is mere surplusage.

8 Barn 261. If 2 or more persons come themselves together in an obligation
2 attes 31. or by a promise, & contract is I of course, tho' y word
2 La Clay 1203. jointly are used. in there are words implying a sever.
obligation or duty. Ch. B. 175.

See 2d
vs 30. 809.
2d Ray
41 1544
But if a covenent begins "I covenent" and is signed
by 2 or more, to I and Several, for the promise I must
be taken distributively. Thus I & B promise. I & B promise.
seem both can't be bound at all.
in B. 175 Corp 832.

These Phrases notwithstanding in Covenants are common to all obligations, and are introduced here for want of a better place.

Pleadings.

By the Plf.

A Declaration in Covenent Broken. shd. state, that the
covenent was by deed. Str 814 Cro Eliz 57. Cro En
128. 209 3 P. 298.

The acc^d after setting out a Coven^t must always allege

a breach.

General Rule. Where the Count is general, a general assignment of a breach is satis. As a Count not to buy or sell certain articles within 2 yrs. An Avesant that A had to B and others within naming whom at given days is good. Ep D 298. Talk 132. 1 L.R. 418

478. 1206 175

If Count of Grantor was well served, an allegation that he wasn't well served, is satis.

The most general assignment is in the words of the Count. As Count as before of the Lease is served in fee. Avesant that the Lease wasn't well served in fee. 1 Co 60. Cro J. 369. Ep D 299.

The breach shd be so assigned as to appear clearly within the Count. As Count by Lease not to cut more timber than shd be necessary for repairs. An Avesant that he has cut to the value of 100 Doll. is not satis. "More than was necessary" to wit is the proper. Cro Eliz 348. Doug 203. Ep D 299.

If by subsequent words the Plff narrows the general Breach first assigned, he must confine his proof to the subsequent words. That is, to the breach as narrowed. and can recover for that only. As Def has not used the land in a husbandlike manner, but has committed waste. There was held that the Plff cd not give Ev of the Def using the land in an unhusbandlike manner, - it not amounting to waste. Harrison vs Manble. 3 T R 307.

Where there is a proviso in the deed defeating the covenant, say so in a certain event, & Pltff need not set it out & negative it. The Def shd plea it by way of defence. As covenant to deliver goods, with a proviso that if the Def is prevented by dangers of the Sea, the deed shall be void. Here is satisfaction for the Pltff to state & agreeant to deliver without violating the Proviso, it being in the nature of a defeasance.

Slide Terms of an Exception in the body of the covenant for an Exception enters into the description of the subject matter, and is part of the covenanting clause. As covenant to deliver a bale of goods, in such an article - Here the Pltff must set out the exception and negative it by saying the breach.

So a covenant to convey a tract of land in the interest of J.P. in it.

If the Pltff sets out his covenant and assigns an inconsistent breach under a verdict, & Verdict shall be rejected after verdict as Turberville. As Count declared after see 1800. and a breach assigned afterwards. It hit May, 1800. good after verdict.

1 Leon 250 If the covenant is in the alternative i.e. for one of 2 things, a breach must be assigned as to both. As Count by Lessee not to cut wood without assignment or consent of the Lessor. & an averment that he cut wood without the assignment and merely cut goods, for it may have been done with the Lessor's assent. This there were no assignment.

So a covenant to convey such land or such house.
Slide

3 Count 23. 1000.

182.

But a short war in 1812, as in the Revolution
the Republic, in 1792, led to a short war
with the "Red Indians" and the "Reds" do not
or have to a short war in 1812, as in the Revolution
the Republic, in 1792, led to a short war

1812 22.4 23.5

1 Jan 22.9 Exp L. 300.

There, there is a covenant to pay in one of 2 contingencies,
we shall first suppose an adverse that one has happened
is sufficient with drawing it to be first. The covenant to pay
in the death of A. or in his marriage which shall first
happen, averring his death is sufficient for either of
the events has happened, the user has necessary response.

In a court that can act shall be done by the covenants.
or its agents. An action is void & the sentence,
which must be laid on the delinquent, not done by
the covenants, or its agents.

Mr. Hale don't hold where this action is. as no agreement Exp \$302
originally, for there an agreement is not presumed or rather
will be intended, if there has been no agreement. see Talk 139.
it appears there has ^{not} been one. p. 228.

It is confined to acting as the agent as to come in lease. If he or she, assigns will build a house upon the land within W. G. M. In an action vs the assignee, he is enough to aver that he has no right.

3 Reb 440 5 (Mod 133. Ch D. 302.

It is a covert to do an act to a than, or his subject.
It is covert, in law in an action but in covert.
That it has not been done, is secret, is secret.

is not to be condemned as he has assigned the Court
the time to say what is due in respect to the law, or
his rights. Justice must show it, if there has been
an assignment & it was done by his assignor.

In Court for a sum certain there can be no assignment
of a demand, and a breach must follow the Court do Court
to say 10 £. per ton for goods, breach assigned for not
paying for so many tons and 1. lb. On Demand the
breach was held all assigned in charging for the 1 lb.

2 Lev 124. Esp D. 303.

Now if the Court had been to pay for 10 £. per ton.

But in the first case, if the Plff. should claim a verdict
for the whole, he may by remitting the excess, take
Judgment for the residue.

When the condition is to do some other act, precedent
to his right of action, he must aver performance, it
does not say so, after request made, the Plff. must aver
request made.

So if the precedent act is not performed, by a 3d
person, performance must be averred.

But where there are mutual and independent Covenants,
i.e. where it covenants unconditionally for the performance of
one thing and 3d for another, performance by A need
not be averred in an action by him or 3d.

So in all cases where a Covenant is independent on one side

is in consideration of the Court or engagement on the other.

By the Defendant.

The most usual plea in an action by the Def. is that of performance.

In Court in actions of covenant, the def. often pleads that he has not broken his covenant. This is bad. For it raises a question of Law to the Jur. It is only argumentative as to breach alleged that covenant was not tested. Plea he has not broken his covenant, has been sanctioned by Court. 8 T.R. 278. It is an irregular mode of pleading performance. 2 Mod. 33. He must plead performance. 2 Vent. 155 2 B.L. R. 1312.

But would such a plea be good, if it concluded, & so the Def. has broken his covenant? 8 T.R. 278. 81.

It would then form it is said a direct Issue.

Let there. Is it allowable? I clearly think not, for it involves every question as well of Law as of fact. That can arise as to the Breach. Indeed it is a conclusion of Law from unknown premises. 2 B.L. R. 1312.

Does not the plea confess the Special Fact alleged as Breach? (By not denying the Special allegations he confesses them.)

This plea runs as a Law, and when admitted, is an affirmative statement of Law, and is not a fact. Co. Litt. 303. b.

Co. D. 300.

This plea is really an admission to the General Title and relates only to the fact that the covenant is a cove., and in some respects indefinite and uncertain.

1 B.L. R. 1043. Cowp. 55. Co. D. 300. Co. Litt. 749. 916. 1 B.L. R. 103.

positive act.

Ch. Pl. ^{dey} 482.

But advantage can be taken of a General Plea of performance, by Special Demurrer only.

If negative contracts are upon the face of ym, void he may plead, as if they were void. This is true of any contract (neg or aff) which is void upon its face. It is by its face. (among other things, not to be used) process of certain kinds. 1 Saund 117 n. 5. 117 b. 83. Hob. 13.

When covenants are in the disjunctive, y def must show which he has performed. Co Litt 303 b. Cro J. 609. 8 Co 133.

1 Saund 117 n.

Secus the plea is ill on Gen Demurrer, as covenant to convey B here or White done. Cro E 233. Com. D. Pl. 25 b.

1 Leon 311.

See 4 Jac 2. where it is said to be ill on Special Demurrer only. But this the true rule on demurrers?

Where the covenants are to do some act which consists of matter of Law, as to convey, discharge &c, y def must plead performance. Especially et "quo modo" is in what manner of conveyance, yet it may appear in the record upon the face of the record. 9 Co 25. Hob 66. 107. 4 Jac 22. Cro J. 500. ^{Little Reading}

So if the covenants are to do an act which must appear of Record, as to levy a fine for the performance, must appear in the Record of which y Et are the Judge.

In covenants or bonds of Indemnity, y def may sometimes,

plead in way of performance, non ad rem videtur generaliter
in them, he must plead, for he has discharged or paid
Plea, and also "non modo" i.e. the particular mode
by which he.

I. If the covenant or bond, is to discharge or acquit
2 Co 4. a from any particular thing ascertained in the Covenant.
Carr 374. (as for such a bond or sum ascertained in such a
2 Co 4. 33. bond) "non Damificatio" ant. word. The ind. plead
1 Laund. so he has discharged, acquitted or paid. &c. show how.
115. 11. a. i.e. by what acts, for the covenant being sp. i.e. to do a
1 Bos. H. particular act, the Plea of performance must for this.
633. n. reason be special. & as the act consisting of matters of
Com. D. Law. it must be pleaded "non modo"
Plead. 325. 2 Ch. Pleas 481.

II. If the covenant is general to indemnify and
1 Laund. save harmless. of such a bond &c. non damificatio
110. 17. is in this case a good Plea for here no specific
Cro E. 326. act is covenanted to be done. & course the def. ant
363. bound to allege any specific act.
634. 2 Co 4. 1 Lev. 194. 2. Nels 120. 5. C. R. 309. 310.

III. And even if the bond is particular as to discharge
or acquit of things, not ascertained as of all demands,
costs and charges. of such a Plea "non damificatio"
is a good Plea. For such a covenant is in effect the
same, as a covenant to indemnify or save harmless
generally, because non constat that the thing covenanted
to has accrued or ever existed and if it has the
Plea must reply to it. Cro E. 916. Carr 374.
3 Mod 252. 224. 1 Bos. Full. 633 n.

IV But where "non Damificatus" is a negative plea,
still if the def plead affirmatively, as that he has
discharged or saved ¹⁶²⁷ himself harmless. he must plead
it Specialy. 2 Co 3. 1. 4. a 1 Saund 117

2 Co 3. 1. 4. a 1 Sound 117. n

Cro G. 363. 634. Cro E. 916.

But, pleading generally, saved Harman, is ill
on Special Demurrer. tho the Plea is affirmative and
subjoins some act done, for the defect is in the
manner of averring the act. Cro^e 916. Its 681 1 Sam 117. n
1 Lev 194.

Mr. Damnicatus ant good to debt on bond conditioned to pay money on a certain day. tho it appears from y condition yt the bond was given as a General Indemnity. for the obligation is in terms for a Specific thing.

1 Bor Tul 639.

If a covenant is for an act to be done even by a stranger's performance must be pleaded specially according to the preceding distinction. E. of the act when done by the covenantor himself must be pleaded. Cro. J. 559. 60.
Op D. 305-

If the Def pleads "non damnificatus" when that plea is proper, a replication consisting of a general allegation of Damnification is ill. As Plea. Pity not damnified. 1 Lev 444
 "Replice" that the Pity has been damnified is ill. 4 Bac 92.
 for there is no definite fact put in Issue and such pleading if allowed wd involve every point of Law. 124.
 as well as of fact. why case might involve —
 "A Special Breach is necessary in Replicⁿ for as the Pity undertakes to show. y damnification, he must show in what it consists.

$\gamma \setminus \gamma \subset E_1$ ከይ ገደብ \rightarrow ገ ያረፋል

201.4

202. 7. 2

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Distinction between Bailiff & Receiver
211. Mode of proceeding in this
action -

The action of account

This is an action founded upon an Express or Implied contract. y^t one who has received y^e property of another. He account for, will render his account for it. If he don't render it, this action lies, if he has rendered it, he is liable for the Balance in Debt. Assumpsit.

It lies at C^t Law only vs Guardians in Socage. Bailiffs & Receivers. 1 Bac 16. Co Litt 172. a. 90. b. a. 2 Roll Abr. 161. 177. Mats P. 237. 1 Law. n. b. 2 Com. D. acct. a. It lies between It Merchants. They being receivers for each other. Mats P. 48.

By St 4. anne. y^e action is extended in favour of one It Tenant, and Tenants in Common. vs The other as Bailiff. Before this St. y^e action lay not in these cases. 1 Bac 7. Co Litt 172. a.

At C^t Law y^e action lay between y^e original parties themselves only. not for or vs their Ex^{rs}, it being founded on such privacy y^t one party was supposed constant of the other's disbursements, and receipts. Com D. account B. Co Litt 89. B. 1. Bac 17. 2 Inst 404.

Exception at C^t Law in favour of Ex^{rs} of It Merchants. This not vs Mem. Co Litt 90. B. Com D. account B. 2 Inst 404. This was by Law Merchant.

The It West 2 (13 Edw. 1) 20 Law. 3. 2 It Law 3. extended y^e action generally to Ex^{rs} in the case of guardians. Bailiffs and Receivers, also to Ex^{rs} of Ex^{rs} and adm^{rs}. 1 Bac 17. Co Litt 89 B.

The St 4 anne extended it vs Ex^{rs} & adm^{rs} of Guardians. Bailiffs and Receivers, and vs Ex^{rs} and adm^{rs} of It Tenants, themselves. 1 Bac 17. 3 Roll. 164. 20. 21.

it now lies generally for and vs the Personal Representative
of the original parties.

The Count It extends y actⁿ to the Tenants, Tenants
in Common, & coparceners, and their Exors and adm^{rs}.
Their covenants. Their Exors &c. also in favour
of favour of Exors who are Residuary Legatees,
vs their Executors and to Residuary Legatees
in general vs Exors. It Count 3^d.

Does it lie in Count vs Ex^r &c. of Bailiffs,
& Receivers (It does by usage) or for the
Exors of those whose bailiffs & have not accounted
1 Roll 116.

In every case in y of guardians in this action.
y Def is charged in y dectⁿ as Bailiff or Receiver,
or both. Com D. ^{act & c. m. a} 116. Com. & dectⁿ & c. m. a.

Distinction between Bailiff and Receiver. Bailiff
is an agent or servant, who has rec^d y property
of any kind of another, to improve and make
profit of it for y owner, and acct, and who is
entitled to an allowance or wages for his reasonable
expences. Co Litt 172. a.

Bailiff must account for y profits wh he has
made, and for those wh he might have
made, by reasonable industry. Co Litt 172. a Com
D. account a. 3. 1 Bac. 19. 1 Tenor 2.ⁿ 2 Fomb. 187. 8.

A Receiver is one, who has received money to y use
of another, merely to render an account for it and who
has no allowance for his trouble Co Litt 172. a. 1 Roll
119. 2 Tenor 18.th a. As a receiver money due on a
bond to B. in the rent of B's Plate Com. D. account
a. 4. Suppose an express agreement that he shall
have an allowance. Is he not still a Receiver.

Does the rule that he has no allowance mean any thing more, y^t the Law gives him none.

General Receivers has no allowance, and aint bound to account for profits, for tis not his duty to employ y^e money for y^e purpose of making profits. Exception as between Pt Merchants. Between them y^e def has no allowance, and accounts for profits. Litt Co 152. u. 1 Roll. ab. 119. 1 Bac 19. 21. 1 Com 93. 1 Com 8. account E. 10. 13.

Therefore a Bailif cannot be charged as a receiver. If he were, he wd lose his allowance. Cro E. 172. a. 1 Bac 19. 1 Roll 119

This action being founded on Honesty, lies not in case of Tort. Com D. acct 89. n^o in favour of the King in Eng. Co Litt 172. 7. 90. b 11 Co. 39. a 3. of Infants. 1 vents. 430. 1 alk^r 489. 2 Vern 295. 342. 1 Com D. acct. a 2. Tonk 118. Cro E 229. Co Litt 89.

If there are 3 or more partners in trade, acct does not lie at Law. Its against their accounts. The remedy must be in Equity to prevent a multiplicity of Suits. Sub Ct Feb. 1808. 2 Bat P. 269. 2 Day 492.

In declarations vs Bailif or Receiver Pltff states that he declared ^{received} such property as y^e Def as Bailif. and y^t Def refuses to render his reasonable account. together with his charges and costs.

Said that account lies not for a sum certain as if A delivers 100 B. to B. to trade with for A. he shall not have account for the 100 B but for y^e profits. 1 Bac. 19. 1 Com D. acct a 3.

Shd not the Rule be, y^t ^{for} a sum certain rec^d, one

2. Siml 189-7
3. Lta
172. a. can't be charged as Bailif 1. Com D. acct. a. 3.
For account lies vs a Shff. for a sum certain
recovered on Est. Rob. 206. So for money recd
by A on a bond to B.

So generally when one receives money for y use of
another, the render account action will lie, it
seems for an account of y money received. Co Litt 172.
a. 1. Bac. 204. 1. Com D. acct. a. 4. viz 110.8. 1 Role
110.22. Decided that account will lie for a sum
certain. Libby 163.

If money has been recd of A for y use of B, to
account for, account lies by B. and here Plff
must declare of whom the money was recd.
Co Litt 172. a. 1 Role 120. Libby 118. 1 Com D. acct.
a. 4. Sub Ct 10. Inact. Rpt is in all these cases
concurrent.

Still If I deliver money to A to deliver to B
for my use, and A delivers it, I can't have
account vs B. for he is not owing to the use.
1. Com acct. a. 3. 1 Role 118.5. Sed Quere.

If Bailee of goods waste or refuse to deliver ym,
account will not, but Trover, or Detinue or assent
on y contract of Bailmt 1 Com D. acct. a.
1 Bac 19. 1 Role abr. 40. for he does not receive ym
to account for or improve.

So it don't lie vs a director of y profits
for y action is founded on contract. 1 Com acct.
D. 3 Leon. 24.

If a Bailif make a Deputy, a cannot have
y action vs the Deputy for want of knovity, but
y bailif may. 1. Com D. 89. 1 Role 118.26. Cont 119,

This an Infant may be an Est & liable for Torts,
yet if made Bailif he is not liable to account
for he is outshored incapable of accounting. Com
D. acct D. 1. 1 Bac 17. 1 Roll 117. 10th. 118. Co Litt 72.
a See Parent and Child.

If he who receives property of another, makes an
Express promise to account, ^{this act} a Special aft^r
will lie. 1 Bac 20. 1 Salk 9. 1 East 89. Keely 164.
354. Esp 96. 7. Contr 139.

But in aft^r said by La Coll. Plt^r shall not
travel into the particulars of the account, but
confine himself to the damages he has sustained
by Def^r not accounting Esp 97. Salk 19. East 89.
Quere 1 Bac 20. Does a recovery in the action of
aft^r thus bar a subsequent action of acct.

If one by deed acknowledges, y^t he has rec^d
property to account. Plt^r has his election to
bring an action of acct^r or on the deed. 1 Bac 19.
1 Roll 118. Dyer 20. Cr^o E. 644. 1 Pow 219. 35. 2 OR 497.
Com. & account a. 4. see "Contract and aft^r 70"
130

If one finds property of another, account lies not
vs him, for the account is founded on trust.
Com. D. a. acct D.

Mode of Proceeding in this action.

In action of account, if Plt^r prevails, there are 2
Indgmts. y^t first ^{compulset} "quod consentit" that Def^r account,
Juditors are then appointed before ^{whom} the account
is laid. 11th 89. 1 Bac 21. 1 Mod 42. 1 Com 92.
1 Com. acct D. E. 5.

In the first issue y point to be settled is an-
 & Def is bound to account (i.e. to render an acct)
 or y 2^d before the auditor he is account to ascertain
 what, if any thing is due to Plff. (in Cont) to
 Def.

Before auditors (in Cont) are of common right
 entitled to testify. They may also by law be
 required to testify and on refusal & may be imprisoned
 by the auditor till they will answer. In Cont 28.

If Def refuses to attend before the auditor, or
 to produce his account, y auditor must award
 to Plff. his whole demand. It 28. In Eng, the
 Ct do it. 1 Com & acct J. 10. Cro C. 805. 3 Nels
 112 for the action does not admit of an Engage of
 damages by Jury.

If auditor find a Balance in favour of Def, in Cont
 they may award it and Indgmt goes for him.
 to recover damages, as well as costs. 2 Fee 150.
 not so in Eng. Executo in Chy. 1 Bac 10. Semb.

As to what Def may plead in bar there
 has been considerable contradiction It is considered
 for the Def to plead to y action any thing
 wh shows y^t he is not bound to account.
 It is a good plea ergo that he never was Bailiff.
 1 Com & acct C. 4. 1 Bac 20.

or all demands

So a release of all actions, is a good plea, in
 Bar. 1 Role 123. 4 Bac 80. 1 Bac 20.

So an award of arbitrators that Def shd be
 acquitted is good Bar 4 Bac 80. Cro C. 82.
 It operates as a Release.

Plea, that Def rec^d the money to deliver to Plff.

9. y^t he has delivered, it, is good. 1. Com. D. acct.
 C. S. 1 Rule 122. 10. 15. 30. 136. 7. Cro. El. 830. 3 Mils 114.
 This shows he never went to account. - 3 Mils 114. 15.
 He is a mere Bailee - These pleas all go to
 show he ought not to account, and ergo go
 in bar to the action. But a Plea that y^e Def^t
 has made paymt or satisfaction of y^e money,
 due is not good, in bar. 1 Bac 20. 1 Rule 123. 4.
 for he is bound to account.

So y^t Def. has fully "accounted" is a good plea,
 in Bar. 3 Mils 113. 1 Com account. C. in this Plea,
 Def cannot go into y^e account, but must prove
 the fact. 1 Post 425. and if the fact is proved
 to be false, in any thing material, there must
 I conclude, be Indgmt "quod computet"

liab^l

But if Def shows that he has been once led
 to account, no Special Plea in bar of action
 is good in fully accounted or a release
 or something equivalent to it, as an demand
 of a release or discharge. 1 Com 92 3 Mils 93, 113, 14.
 Other defenses must be pleaded before auditor, for
 if he was once bound to account & hasn't accounted,
 nor been discharged of the duty, he must be liable
 to account still, tho not as y^e case may be to a
 first recovery.

Fully Accounted. Release &c. must be specially
 pleaded. 3 Mils 113. 4. 2 Lev 149. 10. for they go not
 in denial of the debt but in avoidance of it.

Before y^e auditor the Parties may plead, and join
 Issue, in Law or fact. The issue is then to be carried
 back to the Ct. and there tried. Com. D. acct 3.
 11. 3 Mils. 99, 117. Cro. B. 84, 806. 1 Bac 21. Where if
 the Issue "is nothing in⁸ appear." Does y^e Rule

extend to any other Issue, in fact than a Special one?
No paymt. This Rule as to Issues, in fact, joined
before the auditors is here tried by you.

Whatever can be pleaded in Bar of y action, must
be so, pleaded. & not before the auditors. 1 Leon 219.
1 Bac 21. 1 Com 93. 3 Mills 73. 181. 113. Cro E. 82. 10. This
is to avoid trouble and charge to the parties.
St. 41. 3 Mills 113.

And nothing can be pleaded before auditors contrary
to what has been pleaded in Ct before. 3 Mills 114.
nothing wh impeaches y Indgmt. "quod computat."

Therefore the Pleas never Bailif &c release, fully
accounted. an award in discharge, is not good
before auditors Cro E. 82. 3 Mills 113. 2 Day 118. They are
contradictory to the Indgmt "quod computat"
for they deny the liability to account.

But tis a good discharge for Def. - or as
tis sometimes expressed good account) before y
Auditor, to show any thing wh ednt be pleaded
in Bar. of y action, but wh discovers he ought not
to be eventually liable. As that y property was
lost at Sea. Cost overboard from necessity 1 Roll
8 124. 1 Bac 21. Co Litt 89. ab. Com. D. acct. E. 11. 12.
4 Co 84. a

So yt y goods were taken by Robbers wthout Defi
fault. or by public enemies 1 Bac 21. Co Litt 84. a
Com. D. acct. E. 11. 12. For 600. note was the Plea.
that y goods were taken by public enemies,
in Str 688. a Plea in bar.

That y property was in danger and ^{of decay,} sensible,
and that he sold it ergo on credit, (it is ^{not} ^{said} good
accounting, in his commission authorized

it, for he had no right even in this case, to sell on credit without a Special commission to that effect. 1 Bac 21. 2 Mod 100. But this is somewhat relaxed. - see Master and Servant.

Def in accounting is allowed ^{for all} losses occasioned by inevitable accident, enemies, robbery, &c without his fault. Com. D. acct C. 12. Co Litt 89. a.

Bailif is allowed his reasonable expenses, Com. D account. Co 12. in managing the property. Fieri of Bailif in his ^{own} wrong, as Dispossessor of an Infant. 1 Leon 219. Com D. acct 8 13.

When a award is returned to a Ct. final Judgment is rendered, for a sum awarded, and in Count a fees of the auditors are "part of the bill of costs." Sent one to be paid at the rendering of a award of the successful party. 2 Lev 150.

Auditors are not appointed in actions, ^{of acct} before a single magistrate or minister of Law. he takes the account himself. The Ct. don't authorize him to appoint auditors. 2 Chirfe 157.

In actions of Book debt for more than 17. doll. a Ct in Count may appoint auditors and proceed as in actions of account. 11 Count 37

No appeal ^{lies} from the Judgment given in County Ct. on a award of auditors in Count. (See 2001) 11 Count.

In Eng. a action of account is not so much in use. The common remedy is in Chy.

For in Cts of Law in Eng. Plt^y is not entitled to a discovery of Books, papers &c. nor to

Def: oath. 1. Bac 10. 3 B& 43. 49. 81. Mat 228.

Ct of Count has given creditors virtually all y powers of Chy in these respects. If either party is dissatisfied with a award, he may apply for relief to the court. 1 Bac 21.

An award may be set aside if creditors exceed their commission, or mistake on their own facts, Root 268. 410. or if they mistake the Law on given facts. 2 Day 116. So in case of corruption or misbehaviour. 116

An Court objections to a award are made by way of a remonstrance in writing. The Ct will not generally enquire into the facts, but for mistakes in Law. (nt Intra) appearing on the face of the award, or from the examination of y auditor, a award may be set aside. Kirby, 353.
1 Root 137. 201. 8. 2 Doug 116.
Day

But as to mistakes the Ct will enquire of y Auditors only, not of the persons.

Secus in case of corruption or misbehaviour in the Auditors.

— "finis"

Action of Debt.

According to Sir Mr Bk, debt is a sum of money due by ^{certain} ~~some~~ Express contract, as by a bond for a determinate sum, a bill or note - a Special Bargain. 3 Bk 154. Co J. 172.

But the Epithet Express in the above definition is used improperly, for debt will lie in many instances on Implied contracts. tho' not for a sum certain. 3 Bk. 155. 4 Co 94. a. b.

how as the Plt^y may recover less yⁿ he sues for. it seems debt will lie for an uncertain sum. on an Implied contract, provided the sum is capable of being ascertained. As If a applier for a piece of Merchandize and purchases ^{it} on credit, without any settled price. Debt will nevertheless lie. 1 TC Bk 550. 2 Bue 13. Douglass b.

Debt then will lie not only for a sum certain, but for a sum capable of being ascertained Doug b. 1 TC Bk 550. Debt will lie then either on Simple contracts. Specialty. Indagmt or Recognizance. It also lies sometimes for a Penalty, and is indeed the proper action.

The action of Debt on Simple contracts has been much disused. for 2 causes. Viz. 1. by that species of Trial called Wager of Law. wh allowed y^e Def to swear himself not chargeable and by that means acquit himself of y^e debt or other cause of action. This was deemed Equivalent to a verdict. 2^d It was olim held. that y^e Plt^y must either recover the precise sum demanded or nothing at all. 3 Bk 155. 341. Co Litt 145. Ch Bks 219. 2 Bk R 1221. Doug. 6. 703. in 1 TC Bk 242. 550.

But the wages of Law is now obsolete 1 HLC
1221. Doug 3. 703. n. 1 HLC 38 249 550 Chitt Blk. 212.

But an action of debt will not lie even on an
Express simple contract ^{for a sum certain} vs an adm^r or Est^r as such,
when the contract was made by the Testator. (Because
the adm^r can't wage his Law, not being, as is
presumed known to the Testator contract. (How 182.
1 Lev 200. Chitt Blk 212. 9 Co 87. Cro Ch. 135
187. Cro & 172.

The action however, will lie vs the maker of a
promissory note. For here is an Express contract
for a sum of money. 10 Mod 38. Chitt Blk. 221.

But tis a subject of doubt an this action will
lie vs the Indorser, of such a note. I G. presumes
not. for an Indorser is only in the nature of
an Insurer. or guarantor of y makers note.

Str 680. 8 Mod 373. 1 Lillie Entry 312
Chitt on Bills 22. Cro & 173. That debt will not lie
vs an Indorser. see. Talk 123. Cro & 173 "Contract"

If one promises to pay a sum certain for property
delivered. to his own use. or for services rendered
him. Debt will in general lie vs him. For he
makes himself the original debtor. 3 Bac 186
Cro & 880. Chitt on Bills 220. Cro & 173. 2 Bac 21.
880

If one promises to pay another's debt, y action will
not lie vs promisor. It must be a Special action
in the case. Even assump^t in general will not lie.
Cro Ch. 107. 140. 193. Cro & 173.

So also vs the acceptor of a Bill of Exchange
Debt will not lie. for y acceptor between himself
and other Payee. is in the nature of a guarantor

or mere Surety. But the drawer of a Bill is
liable to Payee on this action Talk 23 Ep 5. 13.
Vent 152. 12 Mod 345 Chitt 220. Bills.

Debt will frequently lie when there is no
contract. Express or Implied, between the parties
to the Suit: as in Penal St. where the Penalty
is certain and given to the Party aggrieved. Here debt
is not only admissible but the only proper action
wh can be brot. 4 TR 158. 7 TR 287. 3 TR 428. 2 And 203
Cowp 882. 1 Roll 598
382

But this action never lies to recover mere damages, —
It is true: nominal damages are sometimes awarded
for detention. but the action itself is brot for debt. as
If one shd sue for Battery and claim Indgmt. that
Indgmt is a good foundation for debt in future.
Rob 206. 2 BB 468. 1 Roll 600. 601. 2 Bac 14. "Telle Debt"
465

So an award of arbitrators to pay a sum of money
for another, is in the nature of a Indgmt. 2 Str 923.

But where a Def in a Indgmt has been taken
in Est, and is in custody on it, Debt will not lie.
For taking the body in Est is deemed for y time
being a satisfaction 4 Burr 2482. Ep 30. 6. 1 TR. 557
6 528. 7. 420. 8. 423. Ep 196.

When the Def on Indgmt has been taken on Est,
and is discharged. by y consent of the Plt, he is
discharged from Indgmt forever. The Plt has no
remedy. 3 Wils 13. 7 TR. 421. 4 Burr. 2482.

The creditor shd in such case obtain a new contract
founded on the original Indgmt as a consideration. 1 Keil 557.
Talk 323. 2 Mod 214. 2 Bac 355.

If goods for y amt sued for have been taken
upon y Indgmt. Debt will ^{not} lie. Talk 323. 2 Mod 214.

When the Pltff on a Indgmt levies goods only, satis to satisfy a part of the Ex^t an action of debt will lie to recover the residue. E. & D. 196.
1 Lev 92.

In Eng Ex^t cannot generally issue after a year and a day from its date, if then Indgmt has been recovered, and the Pltff has delayed to enforce the Ex^t. his only remedy is an action on the Indgmt. he cannot sue out a new Ex^t. Carth 30. 1 Sid 357.
For where he has delayed so long, tis presumed that the Indgmt is satisfied.

By the 1st of Westm. 3. a Pltff may have a *Scire Facias* requiring the Def to show why Ex^t shd not issue anew, it is incumbent on the Def to prove that the Indgmt has been satisfied, in failure of wh a new Ex^t will be obtained, he Pltff cannot however do this without a *Scire Facias*, for it is supposed to be wrong to permit a Pltff to practice so much neglect with impunity. Cro & J. 364. 6 Mod. 248.
Carth 283. 4. 1 Roll 899. 288

But there is an Exception to this General Rule, where the Ex^t has been suspended by a "Writ of Error" here the Pltff may take out an Ex^t after the Lapse of a year and a day for the period of Suspension is to be deducted from the original space of time. Ibid.

From the Forms laid down in Eng Books, it has been generally inferred, that debt will not lie within that time of a Year and a day, &c. so long as Ex^t can be obtained by application to an adequate officer, debt on Indgmt will not lie. I G presumes, it will in some cases, On Bacon tis asserted debt on Indgmt will lie

to punish Def for delay. 6 Tr. 637. East 30.

3 B. & C. 421. 2 B. & C. 14.

In Count of the Co^r dont exceed \$35 it may be brot before a single magistrate, but if it does it must be laid before the County Ct. Co Ct. action Civil.

When the full benefit of the Co^r cannot be obtained, an action of debt will lie. as where Def is an absconding debtor. here by process of foreign attachment y Plt^f may bring an action of debt. T. Tr. 301* 2.

421.

So when Judgment is rendered in one State, and the Def and all his property is in another, here debt will lie at any time how soon post Judgment. T. Tr. 177. as if a Plt^f wished to obtain Interest on his Judgment, he might bring an action of Debt. for in many cases, Co^r will render interest satis to satisfy his due.

An Erroneous Judgment will support an action of Debt, as well as one not Erroneous. for y former is equally available to all purposes, as the latter, till reversed. 7 Tr 458. 3 M. 345. 8 Co 142. 1 Port 176
a b. & c. brings an action vs B. before a Ct of sufficient Jurisdiction and merely alleges as his Plea. that Def has done him damage, here taken debt will lie with y same effect. as if his plea had been good.

By the Constitution of y U. S. tis determined that full credence be given to the Judgments, Records, and acts of other States. There is however a great deal of contrariety of opinion on this point. Con² Art. 4. Sec 1.

In Court. if an action is brot here on a Indgmt in another State. it is as conclusive and valid to every purpose, as if the Indgmt had been issued. and Executed in the same State. But in others it is held to be of no more avail, on a record of a foreign Country, or promissory note. 1 John. R 426. 5 Do 37. Kames 460.

In 1 Dall 219. 188. held to be the same effect in Penn. But of late ²⁶¹ is now in discussion with Court. 2 Dall 302. 1 John. 420. 5 Do 37. Kames 150. So in N York where it is held. that if the Def party to an action in another State. was personally summoned & appeared. The Indgmt vs him was conclusive. 8 John 173. 86. 15 Do 121.

If a Indgmt has been granted in one State, & no notice given to the Def. in another State. an action if brot. wd be void. But the sanctity of the Record here is not questioned. For tis decreed in the Const of the U.S. that a Indgmt in one State Court has the same credit, validity and effect, in every other State. & of the Union. as the one where rendered and all Decs. good in one State are good in another. or others. 7 Cranch. 48. 3 Wheat 234.

"Evidence 63. 62"

There is no light thrown on this Question by the Eng Decisions. but those wh' bear any analogy to the case. may be found 5. East 470. 3 Do 122. 3 Wils 297.

Ray 473 It was held formerly, debt on a foreign Indgmt wd not lie, but tis now decided to the contrary. And its solemnity is no more than that of a simple contract. The Indgmt is maintained to imply a satis concia puma Facie, still a contrary may be shown. by the def. who takes y "Ovis probandi" and he may allege twas made

pactum. Doug. 1. 2 H Bl 410. 5 East 450.

The rule however that a foreign Indgmt may be contradicted, Mainly only as to the Indgmt of Foreign Municipal Cts. not to those of Admiralty. for these are established by the Law of Nations.

In declaring on a Foreign Indgmt a P^{ty} need not declare the original cause of action. he is bound only to state the Indgmt. Doug. 1. Kirby 126.

The Indgmt of a foreign Municipal Ct. is here examinable or impeachable only, where he who claims the benefit applies to our Ct. to enforce it. for the P^{ty} then voluntarily submits his case to their Jurisdiction. But if a foreign Indgmt is pleaded, as a bar or defence. it is as conclusive and effectual as our own Records. 2 H Bl 410. Ray 453. 2 How 232. Skinner 59.

In declaring on debt on a Foreign Indgmt. to count upon it, as a record is incorrect. However declaring in this manner does not vitiate it. = It is merely set aside as Inplurage.

On the other hand "Mul Tied Record" is no defence. he must plead as to the original cause of action. Doug. 6.

In this case Indeb. A^{pt} is concurrent with debt. as the P^{ty} who sues on a Foreign Indgmt. may take his election of the 2 actions. and such a Indgmt draws interest, like a promissory note. as well as impeachable also. Doug. 4. 6. 1 East 436. 436.

It is held when Indeb. appt lies. Debt will also. But this is by no means universal. The Rule requires then some qualification. As for money obtained by fraud, or breach, or by converting y property of another, to one's own use, here Debt will not lie. But Indeb. Appt will, 2 Burr 618. Doug. 6.

That debt will lie whenever Indeb. Appt will, holds only I & C premises, where there are ~~Express~~^{express} promises, to pay money, or Implied from some contract or agreement between the parties. As where there is a Sale of goods without any fixed price. Debt will lie for the price of y goods, can be reduced to a certainty. And in general whenever tr founded in claims of agreement, both will lie. 1 H Bl 550.

In a Indgmt obtained by Foreign Attachment, Debt will not lie, neither in ^{the} state where rendered nor in a foreign country. The object being not to draw y property out of the hands of the debtor, but of more of the garnashee, or Defr Debtor. It is a proceeding in Rem, determined in the Sup Ct ~~at New York~~ or N York.

For money due on bond or single Bill, Debt is y only I Law. remedy. There is no other that will lie. Appt will not lie, because tr a lower remedy, and Covert Breach will not, because tr not of that nature. Cro E 494. 187. 608. 2 Bac 13 Co. 2. 190.

So also it lies in the ^{forfeited} Recognizance of Special Bail. It is like a bond appearing of Record instead of Deed. Co. 2. 198.

Bond or other obligation payable generally, is payable immediately, for the obligation created a present debt, and if it ^{do} not provide for future payment, it becomes due Instantly. 7. T.R. 124. Doug. 639.

If a bond is given for the Specific performance of a collateral act, & the Law remedy is an action of Debt. But where it is in the form of a bond, Equity will give as a remedy, the Specific performance of that act. 2 Bac 13. Ellis & 108. "see Chy Dow?"

In debt on bond, it is said, a recovery may be had exceeding the Penalty, so where the Principal & Interest both exceed the Penalty. I conceive, however more modern authorities are to it.

Burr 820. 2228. Doug. 49. 2 T.R. 388. 2 Saund. 166.
 (Contra held: East 430. 3 East 504. 1 Br Chy 489.
 496. 2 B & C Re. 1190. As a granty to B an annuity of 100 £ during life and gives a bond of £1000 as security for the payment, now it is evident, if B survived 10. yrs. the penalty wd not cover the original debt, or sum. In this case y Ct wd award more. 2 Day 30. In Count as said, interest may be recovered, in the will amount to what shd be recovered, in Equity, depends on y circumstances of y case: (more generally supposed there cant be a recovery beyond the Penalty.
 In a covenant to pay a sum certain, debt will also lie. Str 1089. 1 Role 591.

If a bond is given with condition, that the obligor shall render a fair account of money rec? This will bind him as well to y payment of y balance of the money, as to rendering account. Doug 387.
 2 T.R. 388. An account and a payment of the balance are 2 very different acts, but still it is but a reasonable construction, for it is evidently the intention

of y covenant. that he shd be so bound.

If there is a covenant with a Penalty, y Pltff may have his election, either to sue for damages, in Covenant Broken. or to bring an action of Debt, for the Penalty, in it appears that the covenantor was to have his election either to do this act or to pay the Penalty. - in such a case an action for the Penalty is the only remedy. As a covenant with B. who concludes by paying for the performance of such Covenant. - I bind myself by such a Penalty. - here the covenantor has his choice of Remedies, for the penalty was only in Terrorem. 2 Ale 371. 1 Str 533. 2 P Wm 192.3. 2 Ves 528. Br Chy 418.

It is often disputed an this part of a written contract in the form of a Penalty, is a Penalty or assessed damages, if the former, a Ct of Equity can relieve, if the latter, it cannot.

If a Shff has collected money and neglected to pay it over, an action will lie of debt, so him in favour of the Pltff. There is one of those cases where debt will lie for money. 2 Hbl 550. Hbl 206. 2 Bac 14. title debt.

+ Specific But debt won't lie vs a Shff for having chattels, seized collateral articles, & they remain unsold for want of purchasers. Hbl 206. Cro J. 574. 2 Bac 4.

But if a Shff having taken property on an Est and on his return rates or estimates it as a sum value to pay y whole Est and then neglects to sell them, an action of debt, B & C. concerns, wd lie vs him. for it was the fault of the Shff, that y goods were not disposed of, and so as

it wd contradict the well known maxim,
 that one cannot take advantage of his own wrong.
 2 Saund 344. 2d Ray, 1175. 2d Id. Ray 1075.

If a Thief on Foot seizes goods sufficient for y
~~extortion~~ satisfaction of it, and they are rescued
 from him, he is then liable to an action of debt
 immediately on Final Process. rescue is no Excuse.
 Hob 206. Cro J. 574. 2 Saund 344.

In this action there is nothing wh requires
 any Special mode of Pleading, almost any
 defence may be given in Ori "Nil Debet" is a
 good Plea. in this case: tho the Pt of Limitations
 held not. where it was to destroy the deed,
 but to destroy y duty only. 'twas. Talk 278.
 2d Ray 556. Cro J. 262.

Forms of Debt.

Debt for rent due on a lease, &c. Litt 556. 72
 Cro J. 188.

Debt in short, is a proper form of action
 for recovery of rent on all tenancy, but
 none of Sufferance — he is a wrong doer.
 Cro J 188

Detinue

This action lies for the recovery of a specific personal chattel, and in its nature, as to effect is, like a Bill of Exchange. because it gives a specific remedy. The Indagmt in this action is in the alternative and must necessarily be so: for the chattel may often be out of the reach of Recovery, and hence the Indagmt is either to recover the specific goods themselves, or their value. Co Litt 285. 3 BB Com. 152. Cro J. 361.

This is unlike Trover, in its object. In Trover, damage only is sought whereas detinue lies for the recovery of any personal wh can be identified. & distinguished from any other of the same kind. Detinue will not lie for wheat, or corn unless it has some distinction, as that wh is contained in a certain bag or chest. Com J. Detinue B. 8. Co Litt 286. 1 Roll 555. Cro E. 437.

This action lies only in those cases in wh the Def obtained possession of the chattel lawfully, as by delivery or finding but not if they are obtained tortiously. Com J Detinue. b. 2 Bac 45. 1 Roll 607.

This action has sometimes been classed with those sounding in Tort. but incorrectly. Account in Detinue may be joined in the same declaration with account in debt. + Bac 11.

The subjects must not only be of same genus, but of the same species. 3 Rev H 11 67. 1 Bac 28. 4. 11. 3 Bl 156.

This moreover will not lie for money lent.
but it will for a Bailment. So for a Mutuum,
wh is a Loan of goods to another, wh are to
be consumed by him and paid not by restoration
of the same articles but by something of the same
article 1 Roll 606. 2 Bac 47.

Trover lies in all cases in wh Detinue will lie,
but this don't hold "e converso" Trover will lie
vs the original Taker of the goods by Tort.

But in Detinue it lies only through Action.
Com D. Detinue C.

Detinue has been much quiesced lately by the
Introduction of Wager of Law. & the uncertainty
of the thing to be recovered, wh carries along
with it much Embarrassment. 10 Co 57. a. Cro
D. 244. Yelv 178. (in St. R. 140. 3 Wood 106. held
to be in use) It is however in general
superceeded by the action of Trover, originally
not a C Law action, but derived from Nemo-
2. 2 Bac 45. 10 Co 57. a.

Forms of Detinue

Debt. Covenant. Account. Detinue are 4 orig. actions
founded on contract, known to the Com. Law.

Detinue not out of use. 3 Wood^m 106. 1 St R 14.

Notice and Request

At C Law in all actions, on contract, a request of performance by the ~~Def.~~ Plt. is in theory always necessary. In some cases the request is made by suit only, and here the allegation of Request is a mere fiction. Cro E 798. 12 Mod 92. Chite on Bills 133. 3 Falk 308. Com Dig Read, E 70.

In some cases, a Special request is necessary before suit brt in Covenants. It must be Specially alleged, in the declⁿ, and proved in Evidence. In general where only the fictitious request is requisite, the words "tho' often thereunto requested" is sufficient and when this is the case, the request is not traversable.

But where actual request before suit brt is indispensable, these general terms will not answer. They must be alleged Specially, and with regard to time and place. This Rule obtains also with respect to notice. In wch the Plt in some cases is required, to give notice of some matter of fact, to the Def. and in others not.

General Rule. Where a previous notice or request is in the form of a condition Precedent, a Special request in one case, and actual notice in the other, are Indispensible.

Notice. Special notice may be requisite either by the Express terms of the contract, or from its nature. 14 East 500. 10 Do. 110. 1 Camp 425. The Plt must allege Special notice to the Def. where action will not lie wth (1E) where the cause or event on wch the action arises, is, as between the parties to the Suit, presumed to be confined

to the Plffs knowledge only. As A promises to give B the highest price for a certain article, wh B the Plff can obtain from another person for a similar article. Here the Incumbent on Plff to inform the Def what this price was Hob 57. 68. E. & D 131. New York Ed. 250.

But if A promises to pay B for a load of wheat the same price, wh B's wife gives or has given him, he will be bound to inform the Def in suing him, on the contract, for as B is named in particular the but reasonable to suppose, that Def is equally aware of the fact as well ^{as} Plff is. Com D Condⁿ B. & Cro D. 432. 1 Roll 403. Lord 42.

Secus where A promises to pay B. a sum of money, when he^B is of the age of 21. For here the by no means probable, Def shd know, at least the Law in such cases ^{never} presumes so. But if A promises to pay B a sum of money on ~~Plff's~~ marriage, no notice is required. Com D. St. a. Condⁿ L. & Plead. C. 75. Cro D. 57. Lach 158

Secus where A agrees to account before auditors, whom B shall name. 1 Roll 402. Com D. Plead. C. 75. ^{Field 55.} here notice must be averred.

But if A promises to pay B a sum of money on B's return to London, Plff is not bound to give notice Com. D. Plead C. 75. Cro Jam 112. 228. 405. D. G. presumes this to be a departure from principle, as Plff might return secretly, and thereby subject the Def to manifest injustice. This position is supported by Hob. 58. 1 Buls. 44 12 notice is necessary.

promises.

So if the def. promises to pay money on the performance of a certain act. by I. S. a stranger. for both at y time of y promise are equally ignorant. Hob 14. 1 Roll 402 2 Hen Bl. 315. 16. Com. D. B. 9. Esp D. 131. New York Edition 250. L

So if a Promises to pay a sum of money, if I. S. does it. he is not bound to give notice. I. S. thinks this opposed to Equity. For B has evidently an opportunity of knowing wh A has not. to B.

So if a promises to pay B the cost in such an action. for this is a public Record, and consequently capable of being known by the parties. Com. D. Condition L. 9. Plead C. 75. Cro J. 492.

184. 133. 8 Co 92. v. 4 (Mod 230 18 no notice is req^d.)

Request

In some actions founded on contract. The Plt^f must request before suit brot, in others not. Here again the principle of discrimination is the same as in notice. However in Request the Plt^f must include in his decl^r the clause "tho often thereto requested." wh is not necessary in notices.

If the Def promises to do a thing collateral, y Plt^f must make a Special request before action brot. By collateral is meant any act or performance, or y payment of money, or the payment of money, when to fore aⁿ other debt. As a promises to deliver a load of wheat on request. Here there must be Special demand. The request is part of the consid^{er} Com D. Plead C. 90. Condition L. 10. 11. Cro. E 85.

Of a promise to pay money on Request for a debt of his own. There is no necessity of a Special request. But if for the debt of another, it is. in the latter case tis supposed to be a part of y^e consid^r. But Why? because in y^e former case y^e debt or rather duty is independent of the request. But in the other there must be an Express engagement between the Parties.

So if a promise to do an act of Service, a request must be made.

So if a promise to pay B. a collateral sum of money, a Special request or demand is necessary, for this the stranger might have owed it, yet the promisor was by no means indebted. Therefore the request is the only consid^r and tis a condition precedent. 3 Salk 308. Lamm 32. 2 Ld R 126. Str 88. Cro J. 183. 523. 639. Esp J. 131. 257.

A promise to pay B on request, such sum of money as B shall disburse on his account. here a Specific request is necessary, for A is supposed to be ignorant of the quantity expended. Com D. Pleas C. 69. Cro E. 83. 4. 91.

In these cases where a Specific request is necessary. - it is always traversed by the Def. for tis a condition precedent. On the other hand where the promise is to pay on request, what is already his duty to pay, a Specific request is unnecessary, for the sum here promised is not a collateral sum. This the promise be to pay on Request. yet the request is not a part of y^e consid^r and ergo it does not require it. As a promise to pay B. y^e price of goods sold on demand. here no request is necessary, because

The debt existed independent of the promise, which is only a confirmation. It therefore suffices for the Plaintiff for the Plaintiff to say "Def has not paid, the 'often Mercants requested' 1 Mills 33. Esp. D. 131.
1 John C. 319 & East 555.

Where the promise is to pay on demand, an actual demand and request, when the debt is either precedent or independent of the cause of action. As a hire of a horse from B. and promises to pay on Request.
3 Taunt 300. Cro E. 74. 3 Leon 200. Each 23. 200.
Lama 32. 3.

Secus where a promises to pay his own debt by a given day, or in the failure of thereof to pay double the sum, on Request. Now if it is not paid on the day, a Special request must be made. For here the debt was independent of the promise, yet the Penalty was not. He might sue for the original debt without request, but not when united with the Penalty. ^{Yell} Sel 66. Lama 32. 3. 2 Bull. 229.

When a Special notice or Request is necessary, it must be alleged, as respects time & place, because the allegation is strictly traversable and all traversable acts must be distinct as to time, and place. Cro E. 183. Cro E. 80. Com D. C. 69.

It is not necessary however, to allege time and place, where the general Issue is such, as will involve a denial, because it is not distinctly traversable. But on the other hand, if it was respecting the Indorser, of a Bill of Exchange,

in wh case the holder must have given notice, that it was dishonoured, here time and place is not necessary, because the ^{general} Issue involves a denial. But in the case of Covert, "non est factum" does not involve in the general Issue, any denial.

Where Special Notice or Request is necessary, if the fact is not alleged, in the declⁿ, omission is fatal and can never be rendered, Com D. Plead. C. 69. 3 Bnls. 299. Cro D. 183. Cro E. 74. 85.

When Special notice is not necessary, if tis alleged, it is considered as Puffage, and need not be proved, nor is it capable of being traversed. Salk 622. Cowk 413. 1 Selw 174.

Where there is a contract to do an act, on request, wh Def cannot discharge wth Tender, a Spec^l Request is indispensable. As a Merchant gives a due bill to be given in goods at his store, now, he cannot discharge wth Tender, ni a Special Request is made, and if there was even a time fixed. P. C. conceives there wd be no difference. Where a Stranger is selected to choose the goods, tis incumbent on the Merchant to request his attendance, 3 Salk. 308. Cro E 85.

Sum of Notice and Request

If there is a covenant on y Part of Lessee to repair. if y Lessor will furnish y timber, y Lessee must request y Lessor to give Timber.
Com. D. Cont L. m.

Where a Special request or notice is necessary before bringing an action, y notice and request be pleaded 'at such time or place.'

Err E. 85. Err D. 183. Com. D. 4-11. Q. 69.

When there is a contract to do any thing, on demand. and wh Def cannot discharge ~~at~~ by Tender without request. Special request must be indispensable. !F.

Leten in eigen ijt

which is an action of replevin in the case to recover
damages, for a breach of implied contract. 3 Bl 158.

1 Pet. 52.3.

The action is resumed on the 16th next i.e. 13.6.14 at 12.50

and now intervene at the 2nd side.

3 Peer His En. Love

58. 2. Do 202.3. 243. 89. 39/.

And all contracts not under seal, even the reduced
to writing, are simple or bare contracts, an unwritten
writing not being the contract, but merely evidence of
bare agreement. 7. PR 357. in 1 Felw 53.

On contract, an Exec is a specialty, thus action limited. The higher remedy on such instrument, is writ of assumpsit. Cro. C. 494. 608. 187. Cro. C. 575.

Exp D. 198.

Some writers have made a distinction between contracts, resting merely in Part, and contracts reduced to writing, but not under seal, and consider the latter of higher rank than the former. 1 Pow. C. 431. 11 (Maro 27.

2 Cane, 246. 18 1/2 B. 219. n. (Contra 7 LR 357. 1 Feb 53

1 Pow C. 269. night

But the Law recognizes no such distinction in the case of Instruments governed by the Law Merchant.

The contracts upon which this action lies, are either Express or Implied. In the former case the promise or agreement is actually made, i.e. expressed by the Party making, bound. In the latter it is raised by Implication of Law. 1 Selw 53.

In the case where the promise is in action, it is said
to impute from an actual debt or duty, which is binding,
it always imputed. In consideration of the promise made.
As an action on an implied promise is always more
ent. *See* *Ex D. 1. 1 Selw 53.*

2 Ch. Pl. Title 1st Pl. distant 1. inward.

But the law will impute a promise from an
impliedness in existing consideration, yet a contract
there can never be imputed from a promise actually
made, but the consideration must always be actual. Hence
an action will not lie on a promise even in writing,
without consideration. *5 T. R. 582. 7 Do. 357. n. 1 Selw. 53.*

2 John. 237. 8.

As to the modification of this rule under the Law Mer.
see 13 L. J. 8. 26. 101.

In general as between the party bound and a
certain Donative Consideration, a action will not be considered.

A promise on an Implied promise is called an indebtedness
contract. It is in the nature of an action of debt.
The debt being stated as the ^{side} condition of a promise,
and the recovery is as to a debt together with special
damages if any. *Ex D. 1.*

But the promise even where it is implied by Law only,
is always alleged in the declaration, precisely as an express
promise, and upon the face of the declaration, it is taken
to be an express actual undertaking and is always
considered as such upon Demurrer or motion in
arrest of Judgment. *Cowp 289. 1 Q. 357. n.*

Indeed there is no such thing as an Implied promise
in Pleading. On the face of the record it is always taken
to be an express one. *6 Mod 131. Balantine 220*
If the Def. demurs, where a promise had been in writing,
he admits it to be in writing.

Assumpsit being an equitable action, it is generally in all cases in which the Def. is bound on the principles of Natural Justice, to refund money which he may have rec^d from the Plff., or to pay money when the Plff. has a legal right to demand it. 2 Burr 1012. 3 Do 1357
4 Do 1896. Cowp 110. 796. 7. 2 S.P. 370.

And hence in general any equitable defence to an action Assumpsit is satis. If then it is not of good conscience for the Def. to retain the money or to refuse payment of it to the Plff., he is in general not liable in an action. Ibid 2 QB 284.

Hence he who has paid a debt of honour, gratitude or conscience is one barred by the Stat of Limitations, can't recover it back in this action.

This Rule viz. if any thing equitable is satis. applies more extensively to Indebitatus assumpsit than to Special or Common assumpsit. For the law will never impley a promise to pay where nothing in good conscience is due, and the party may be bound by an express promise.

Indebitatus Assumpsit. for money had and rec^d.

II

It lies to recover back money paid by mistake. 2 Burr. 1010
For if one has paid money by mistake, he is in good 1 S.P.
conscience entitled to recover it back again, and the 285
receiver cannot in good conscience retain it if by Cowp 500
mistake in computation he pays more than the amt. due. or if he pays to B. money paid to A. to money 4 S.P.
paid by an insurer on a ship, supposed to be lost. 5 Burr
and the boat never safe. Insured holder 2637.
said to be an insurer. 1 S.P. 343.
4 Do 1284.

A Tortion if money is obtained by fraud an action lies to recover it back.

If an Indorser has paid a bill, & it post appears yet is warranted by the Indorser has not been complied with, he may have an action to recover it back on a breach, was obtained by fraud or mistake. 11. *Supra* Lea & Holby.

1148

285

112.

Doug

637

3 Drafts.

74.

These belong
below it

So if one pays money under a belief arising from a mistake in a matter of fact, yet he is under an obligation to pay, when in fact he was not, an action lies to recover it back. A man having a wife living, marries a second time, and takes money &c. belonging to the second wife, she may recover it back, in this action, on he acted fraudulently or not.

1 La 28 Cb & 2.

5

To it has been held, that where a Banker has paid a bill in full, when he has a debt to the Banker, who he might have set off, he was entitled to recover in this action he not knowing that he was so entitled.

Supra.

If a ground of a action is was a mistake in law, it is correct. It seems not "ignorantia Legis remissionem excusat." 3 East 468 Doug. 408. 407. 2 LR. 713.

But it seems too much has been unintentionally said.

2 La Ray So if on settlement of account, too large a balance is struck by mistake, in computation or items, and the whole balance so found is paid, the excess may be recovered back.

In an action for money paid by mistake, it will

necessary for a Plaintiff to show, y^t the Def^t was guilty
of fraud or unfairness. It lies, tho both parties were under
a mistake. 6 J.R. 606. 2 B. & A. 94. 10 J. 2. 19. 2.

But money paid under a Rule of Ct. cannot be
recovered back, as money having been paid by mistake,
tho it shd after appear, not to have been due. &
Recovery wd impeach y Record collaterally. It is in
y case of money recovered by Judgment.
2 J.R. 648. 10 J. 2.

So money paid on a forged bill of exchange, by the acceptor
to a "Bona Fide Holder" for valuable consid^r, cannot
be recovered back, for such a holder can in conscience
hold y money, and y Laches, if any are on y Plaintiff, will
Affect y party guilty. 3 Burr 1307.
10 J. 2. 10 J. 2. 13.

So if one voluntarily pays money with a full knowledge
of y means of knowing the fact, wh drove him not
indebted, he cannot recover it back. "volenti non
fit injuria" as Insurer knowing y^t y warranty
has not been kept, still pays y debt. 2 East 468.
1 B. 260. 2 J.R. 824. 1 J.R. 60 2 J.R. 728.
1 Do 279. 4 Do. 221. 10 J. 2. 298. 1 J. 2. 12. 132.

So where a Party being sued, pays y demand, protesting
y^t he aint bound to pay, or declaring y^t his payment
shant prejudice his Right, he cannot recover back
y money paid, on y ground upon wh he thus objects,
tho y^t might have furnished a good defence to y claim
made upon him. He shd have defended in y Suit. Per Cur
10 J. 2. 10 J. 2. 13. 1. 10 J. 2. 279. 2 Do 546. 35.
As to La Denying reason. Quere. 279. 84.

Payment of money to Agents when not due.

Corp 204. I. If an agent obtain money tortiously, under colour
 Left 255. of an authority from his principal, but actually for
 Esp D. 2. himself. he is liable at all events for money had, and
 N.Y. Ed. 4. rec^d to y^e P^rinc^pal, and a subsequent payment over wd
 be no protection to him, for he receives y^e money in fact,
 in his individual capacity and in his own wrong.

Corp 182. 204. 4 Ill. 485. Esp D. 5. N.Y. Ed. 17. 3 Esp 231.
 N.Y. Ed. 17.

3 Lev 262 Second. If he rec^d money for his principal by way
 3 Esp 231. of a wilful Tort of his own. as by extortion, violence,
 Esp D. 2. or fraud. y^e rule is y^e same, and payment over before
 N.Y. Ed. 17. 26. action br^o cannot avail him. For a servant when
 guilty of a wilful Tort is personally liable.
 "Little Mas Servant 25"

Third. If he receives money bona fide. for his principal,
 Corp 565. but wth right, as by mistake, he is liable, provided
 Esp D. 2. he was not a known agent. I hav^t heard of over.
 109. N.Y. For he cannot in conscience return it as between
 Ed. 202 y^e payee and himself, especially as y^e former knows nothing
 of the Principal. An Agent sells property as his own,
 and by mistake receives too much for it and hav^t
 paid y^e money over. 5 Burr

If paid over. and payor has made a claim of repayment
 before th^o was paid over, wd y^e Agent be liable?

So it seems to be supposed in Burr. 3. Burr. 1984.
 5 Burr. 2039. Esp D. 100 N.Y. Ed. 200

Fourth. If an agent acting bona fide, is a known
 Esp D. 2. agent and receives y^e money thro' mistake, he isn't
 N.Y. Ed. 200. liable in y^e action as y^e money has a hav^t been
 3 Burr. 1984. paid over to y^e Principal. for y^e Principal being
 5 D. 2033 known. y^e money paid to him as agent. Payment

to him is virtually a payment to a Principal. This must be a case contemplated by Lord Kenyon, where he says that if money is paid to a known agent, he is not liable to a party paying it - *Ex 480.*

Ex D. 109. or 210. 11.

Contract Act 27. not Law

See *Ex 480.* where it is held yet if it were not paid over, he would be liable. But to manifest yet a thing contemplated, a breach of Trust, in the Agent.

Sifth. Tho he were not a known agent, yet if he acted *Comp*
Bona fide & has paid a money over to his Principal *500*
 before action is brought or request made, he is not liable. *Ex D*
210.
 There is no greater fault in a payer, and it would be
 be inequitable to subject him after he has parted
 with a money, and oblige him to seek his own
 remedy vs a Principal

duly

Where an Agent duly authorized, actually rec^d money *Ex 480*
"bona fide" for his Principal, not sent in consequence *12am*
 he retained. a Principal is liable for it. and a money *335*
 has or has not been paid over to him. For a payment *Ex D*
 to a Agent in such case, is in fact a payment to *110.*
 a Principal. So yet a Agent's liability, does not exclude
 a liability of the Principal. as payment by mistake, and
 or on consideration not fairly lost.

Note the 2. & following Rules he should have been introduced
 before a above distinctions as to Agent.

1. Where money has been paid to one supposed to have
 authority to receive it as an Agent to the Public. *Comp 204*
 or to an Individual, but who in Reality was not *Loft 300.*
 such, or had no such authority, it may be recovered *Ex D 2*
 back in this action vs him, tho he was guilty of *or 4*

no fraud. but believed himself to have authority
 As Paying to a Custom house officer of duties, erroneously
 supposed to have been imbued by Law, for he actually
 rec^d money in his individual capacity

§ But where money has been paid by such mutual
 mistake to a subordinate public officer in his official
 capacity, or to a known agent: I have been bound over
 to a Superior or Public officer, no action went
 in to recover it back, of a officer. The only remedy
 is on a Principal. As overpayment of duties by mistake
 to a collector, who has paid you over to a Public
 In such cases, lay me to a agent is *Spae facto* pay me
 to a Principal.

II It is to recover back money paid on a consid^r
 which happens to fail.

2 Day-
 43rd.

Failure consists not in the want of value, in a consid^r
 rec^d but in not receiving the stipulated consid^r as
 to recover back money paid, in consid^r of a grant
 of an annuity, it is proper to be void for informality.

2 D. 207. 1567 300. 2 D. 300. 0 Cast 241.

3 Cast 10. 2 D. 633. 4 D. 100.

12th 12
 303.
 3 D. 102
 -261-

But a recovery can't be had in such a case, in a
 grant has been set aside or grantor has refused
 to pay a annuity or to execute an absolute grant.
 It will be in consequence. 2 D. 1. 3.

§ One has paid in advance, of freight of goods. & they
 are not actually carried, & party paying may have
 this action, to recover back a money paid, in a failure

is imputable to him.

3 John 340. Bro D. 9.

It lies also recover money paid in advance for y purchase of property, as land, to which y lender can't or will not make a good Title, or if it differ essentially from y description of it given in y contract.

2 Day 437.

3 Bro. L. 162.

1 Eob R 107.

2 Eob R 535. 5 L. R 606. Bro D. 3

After if paid voluntarily, with full knowledge or means of knowledge of y Incumbrance.

1 L. R 65

2 Eob R 123. 4 Do 221.

Bro D. 57/12.

Vendor

But if the vendee in y last case make a deed of conveyance, according to y contract, y vendor, remedy for want of Title must be on y count, in y deed. The simple contract is merged in y deed.

So where y property agreed to be sold, and for which money has been advanced, has no existence as land described, it can't be found. 1 Sale 428. Bro D.

Such as to y case cited as a proper deed of conveyance had been made.

So where money has been advanced to a Person for an act to be done, by him or future and he derails, himself to do y act. It may be recovered. Statute.

1 Cor R 480.

2 Eob R. 522.

5 Co 21.

So if money has been advanced for y purchase of an estate & y buyer recedes, from y agreement, in consequence of y other party's misrepresentation of condition of y property and the buyer may recover with the money advanced, his expence, for conveyance proposed, and y interest of y money paid for y purchase.

1 Eob R

218

Co D.

11.

But to recover back such advance, a debt^r must be specific. I.e. he must specially allege & prove in his debt^r. The common money counts are not satis. In ym he can recover only y purchase money and interest. For it isn't a case of money paid to lender, nor for his use nor had and rec^d by him. 1 Esp R 22. 2 Esp R. 641. 2.

1 Bos. & P. 306. 3 Do. 245. 2 Ch. R. 125. n

To recover back money advanced on a promissory note when the title proves defective, it isn't necessary y^t the Debt^r sh^d have been evicted. It is satis to prove y title defective. But as to y point y^t one is in the Debt^r.

III. It is also to recover back money paid under a void authority or more properly rec^d under a void authority as it being made to D. or under a forged power of atty, given in B's name for y debt and recover and implead it. I may recover it back from D. as money had and rec^d to D. by him.

1 Bos 33
Esp 3^o
12

After where a person claims a debt however unjustly, claims it under y authority of a Pt & Com^{pl}ent Jurisdiction. As under letters of admⁿ to a debt^r person by a Chancery Ct. for tis paid by authority of law 3 T R 125. Contra as to y last point Talk 27. But amended & Clarified 1211. 3 Sum. 1284.

But if y authority were void, y debt wd not be discharged. As if y supposed Chancery in y last case had been lying.

So if a forger, or person to himself to receive a 3rd R^d debt due to B. and does receive it. B may still ¹²⁷ recover it of y debtor and y latter may recover it back from A. 1 Ed Day 742. Ek D. 3. or 13/14.

IV. It lies to recover back money obtained by extortion, oppression, imposition, or any undue advantage taken of another situation. A, if more than y debt due and legal interest is extorted from y pawnor by y pawnee as y consid^r of redelivering y pledge. y Pawns may be recovered back in y action

Sts 915. 4 R. 485. 2 Burr 1012.

Comp. 182. 793. Ek D. 4. 5. or 14.

So if money is paid by a Bankrupt or his friend to a creditor, as y consid^r of his signing a Bankrupt certificate. Doug 671. 2 R 753. 3 Dallas 337.

Ek D. 5. or 14.

So where money has been obtained by unfair or fraudulent means. tho' y party obtaining it may have had a Legal Right to recover. If his right depends upon a question of P. L. Jurisdiction. as where y son of P was entitled to a Bequest but obtained under a forged certificate of marriage of his Parents. 1 Cam 128. 9. Ek D. 15. New Y. Edition

But no Interest is recovered. Quere?

Is y qualification necessary. Suppose y money under y Reception had been obtained under a decree (forged) in Chy. or a forged P. Law Record or a forged power of Atty. wd not y Issue be the same?

Aliter where money has been obtained by a Judgment of a Ct of competent Jurisdiction, not reversed nor

in any way set aside or by award of arbitrators. For the Judgment be. were obtained by fraudulent means, as subornation of Perjury. The Record in a first case, is an Estoppel & an award has a similar effect.

7 T.R. 269. 3 Do 125. Day 130. Esp D. N.Y. 18. 18.

(But when a judgment has been set aside, a money may be recovered back.

When set aside on Mistaken, a money may be recovered back by Judgment of Reversal.

So where a judgment is set aside for irregularity, the money paid under a Warrant or sentence may have been paid.

1 B.R. 219 In *Moses v. The Comrs. 2. (Dun 1845. 1. 111)* who was def in an Inferior Ct. recovered back what had been recovered from him in an inferior Ct. on a motion of his defence to a first action, which had been paid at 3rd Law. was not equizable by a Inferior Ct.

If a defence was equizable by the Inferior Ct. then a plea was in substance to well settled principles of law.

There in a case may not be law.

2 H B 416. 75 R. 209. Esp D. N.Y. 18.

Money paid on a compromise becoming a debt may be recovered back, if paid by mistake or obtained by fraud.

If money paid on a judgment after reversal, has passed to a 3rd person, upon fair enquiry, it cannot be recovered back, from him, and he were a party.

or agent who obtained a *Quidant*. *Ex D. 60 16.*
2 Day 152. Ex N.Y. 18. *2 Burr 1009.*

V. It lies to recover money advanced as money
 had and rec^d as where one's servant or Agent
 wrongfully appropriated to his own use, or money
 of master or Principal. *Bull St P. 130 1 Cr 11 172*
Pea R 223. 6 Cranch 246.

And in such cases to have been held, if infancy is no *Ex D.*
 defence, or action the sounding in contract, being founded *17. 18.*
 in substance in Tort. *1 Cr R. 172. Pea R 223.*

Where if the Infant was interested with a money?
 by a bill as he or then recovered, if at all, upon
 an express or implied contract of *Quidant*.
1 Lev 169. 8 T R 335. 1 Keb 905. 19.

So it may be recovered from a 3^d person who has rec^d
 it illegally or "mala fide" if it can be traced to him,
 as where the Servant has paid it away upon illegal
 contract or lost it by gambling. *Cook 139. Loft 756.*
Ex D. 18.

VII. A Party who has paid money on an illegal
 transaction, may recover it back in this action if he
 is *Particeps criminis* Thus if money is paid to a Person
 of a Lottery Ticket, when such insurance is illegal and
 void as in Eng. by St 12. Geo 3. Sec 36. for y 1 H B 6
 insured and regarded as "*Particeps criminis*" *Ex D 6. 5 20*
"vide Infra" 2 Bb R 1073. 6 T R 405.

So where illegal interest has been paid, & does may be
 recovered back in this action and yet only for y principal
 and lawful interest are in conscience due.

St 915. Tolt. 38. Ex N.Y. 20

But where a contract is of such a nature, as to render

A party paying "Paribus Eminentis" he can never recover back what he has paid. As a traveler on a railway ticket says of 10p. he can't recover it back.

1. Pow C. 201.

Parish 790. 8 J.R. 555.

Exh D. 7. or 20. 21. 181.

The same Rule holds where a contract was made in a foreign State and in violation of a Law of this State. For a right, duty, or obligation created by a contract, is determined by the Law of the contracting State. Exh D. 23

2. Cairnes 147.

But if one has been ignorantly engaged in such transaction with the interposition of a partner and has paid, he may recover it back from the guilty partner.

If taken, a contract as to a illegal act, to be done, is still Executory. A party paying the money, may still recover it back. As A advances money to B. to induce him to use undue influence to obtain an office for A. etc. A. may recover back the money so paid at any time before the office is procured. Doug 457. (470 in last Ed.

Salk 22.

1. Pow C. 200. 201

Bul N.P. 130. 1. 2.

Comp 1790. 1 B. et F 292. "Contract 37"

73 1530. But if a illegal act is executed and both parties are "in pari delicto" if money is paid, it cannot be recovered back. Doug 470 or 457. Exh D. 21. 22.

+ J.R. 561.

2 B. et F 467.

Quere. as to the correctness of the distinction in principle? Could policy require that the money should be recovered back, in both cases or in neither?

So where money deposited with a stakeholder, on an illegal wager. as Boxing has been paid over to a winner, after a event decided, with the consent of the loser, it cannot be recovered back from the winner.

So it seems if paid over without his consent.

But if a stakeholder has paid over to a winner after being prohibited to pay, & after action brot by a loser, a stakeholder himself has been holden liable to a loser.

Ex D. 7. 12. Doug 630. n. 8 & 6 5. 5. 1. 2. 3. 4. 5. 208.
for 22. 55. 5

This Rule is denied in 4 John. 426. and thus these holden, y^t after a event decided, a loser cannot prevent payment over. Ex D. 2. 1. 9. 25. 55.

P. G. thinks a former Rule a correct one.

The rule wd by a same, if a stakeholder pay a money over to a winner after prohibition, tho before action brot by a loser. P. G. trusts in a same. 3 J. 2. 405. 3 Linc 322.
Contra. 4 John 426) Ex D. 12. or 35.

Is not y^r Rule correct? Can a winner recover money deposited from the stakeholder, any more than a loser himself, if there had been no deposit. Mart In 43. 2. 1. 5.

Ed a winner recover it of a stakeholder, if there had been no such prohibition? It seems not, for he must be an illegal contract.

It has been holden y^t if money has been deposited upon an illegal wager, and not paid over, either party may recover his own deposit from the stakeholder, even after the event is decided as he cannot in conscience retain it to either party. 5 J. 2. 405. 3 Linc 322.
7 J. 2. 525. 8 Linc 381. n.

This doctrine is also denied 4. John. 426. Ex D. 12. 25. 55.
But there no objection on principle to a Rule,

money is in y hands of a 3^d person.
May not either party countermand y^e authority before
y authority is executed? And besides by what Equity
can y Stakeholder claim or retain it either.

In y case in 4 Bohn. 426. y illegal act was executing
the illegal act contemplated by the St. was not y
horse race. but y paying or receiving y money lost.
If y contract is illegal, only because y performance & y
payment will be so.

And it has been decided in Eng. y^e money deposited
in such cases may be stopped in Transit.

The Rule S. R. 400. seems to be y true one.

It was once held according to y Report of a case,
in 7. T. R. 584. S. y^e money paid beforehand to one of y
parties to an illegal wager, might be recovered back
after y event. This in his his. favour. This case seems
to come directly within the General Rule. Indeed
y current of authorities is clearly for it.

1 Part 98

In 8 T. R. 575. it is said y^e case in 7. T. R. 334. S. was
misreported and y^e action was v. the Stakeholder,
before payment over.

If one has paid money on an illegal contract to a 3^d person,
for y use of y other party, y latter may recover it from y
3^d person. for he has no Equity to retain it. There
is no contingency to happen in future. As Brouwer on an
Illegal Policy pays y loss to a 3^d person, he pays over to
y Insured. y latter may have y action v. y 3^d person
to recover it.

If one of y parties to an illegal contract elects to pay
y loss, no 3^d person has a right to prevent him. It is not
strictly a stakeholder but a mere carrier or depositary,
under a condition or obligation to do a specific act.

3 F 3. 295. Esp D 24.

Where a claim to money is given by Law, y action is apt.
This note apt for money had and rec^d, is to recover it
tho y Dg hadnt received any money of y Ptz. As for
a penalty incurred by the Byelaws of a corporation,
or Society of wh y debtor is a Member, provided y Byelaw
itself is legal. For a person becoming a member
implicitly at least to pay all legal claims arising
from such Byelaw. 2 Lev 222. 6 Co 60 20.

And a declⁿ in such case must be Special. For there
is no General count adapted to y case.

Also lies not to recover a Penalty of Govt of the State.
If y penalty is certain. Debt is y proper action, because
it is said to be a higher remedy.

It lies to recover Fees given or allowed by Law, as
Fees of atty, Fees of Commissioners appointed by Chy to
take depositions. 2 Str 747. 1 Chy 330. 6 Co 682.
2 Lea 2. 182.

And negligence by y atty is no defence to y action,
in twas such as deprives y Client of all possible benefit
from the atty's services. 2 A R 130. Esp L. 184. 30.

And not y atty be liable in a Special action on y case?
for any degree of negligence injurious to the Client?
"Action on the case for 2 facts 12"

To recover any allowance or reward prescribed by Law.

Ex 12 L. For y discharge of any duty imposed by Law. as if one
 Insurance or Corporation is bound by Law. to maintain
 a bridge, road or wharf. allowe a certain toll or duty
 for it. 3 B. & M. 1408. 1. B. & L. 413. 2 Do 104.

Ex 13 L. 33.
 Indebitatus ap^E for Money paid. Laid out. &c.

In y^s class of cases y Plff is supposed to have advanced
 money for Def^t's use.

Gen Rule. Where one laid out money for y use of
 another at y latter request, Express or Implied. y Plff
 raises a promise of Repayment on wh y^s action lies
 A request either Express or Implied is indispensable.
 and the action is called ap^E for money paid, laid
 out and Expended for y use of the Def.

As if A at B's request pay B's debt. A may recover
 a reimbursement in y^s action, even tho y money was p^d
 on an illegal contract between B and C. As money won
 of B on an illegal wager. For A being not Participat
 Criminis, is not affected by the illegality of y contract.
 Ex 8. 10. or 31. 33. 2 Mil. 300. 1 May. L. 181.

So if the debt were mutual, between B and C. For
 y paymt by A. is equivalent to a loan to B. for y^t amt
 to enable him to pay the debt.

25. 2282. So if one of 2 Pt Debtors pays y whole debt, he may
 8. Do 186. compel his Co-debtor to contribute his proportion in y^s action
 3 B. & M. 225. 5 Co 124.

8 L. 2. 86. The above General Rule never obtains as between Pt
 Mortgagees, where one is sued and pays y whole sum.
 For y Law will never imply a right arising out of
 a Tort as between the Tortfeasors — "Chantle 30 20"

General Rule. No person can by voluntarily paying another's debt without the debtor's consent, either Express or Implied recover of the latter, y amt so paid. He cannot thus make him his debtor 8 T.R. 310. 013. Eo D. 10. 31.

There is an Exception to y Rule by y Law Merchant where a stranger accepts or pays a dishonoured Bill of Ex. for y honour of y Drawer. see B.R.C.

If one is compelled by Process of Law, to pay money for another, Except in y case of a Tort, it may be recovered back. And there were no actual request. For in every such case, y Law implies one. As A's goods being in B's possⁿ are distrained for Rent by B's Land Lord, and A is obliged to pay the rent to redeem y goods. A may recover back y amt in this action from B.

2 T.R. 104. Eo D. 10. 86. or 31. 170. 8 T.R. 308. 3 Eo. R. 8.

Where one is compelled or compellable by process of Law, to pay another, y action will lie As Surety is sued and compelled to pay, or if he pay without Suit and without actual request, for he is compellable to pay it.

2 T.R. 104. Eo D. 10. 80. or 31. 170. 8 Coups 525.

It was once supposed there was no remedy at Law in such case. But tis now settled that there is.

So where y debt paid by a Surety, was founded on an Unsound considⁿ, Mar. 32. Eo D. 133.

It has been said that if the Surety knew of y action being Usury, he shd have defended us y claim. 1 Felw. 61.

Sed there, y Rule is as above. "Usury"

It has been holden yt if y Surety instead of paying
 y debt, gives his promisory note to y Creditor, who
 accepts it as paymt, he may recover of y Principal
 as for money paid &c. before he has advanced any
 money. 3 Mil. 14. 2 Esp. 257. 36 238. 5 Mass. 281. 10. 32.

But in a subsequent case in B R, it has been holden,
 yt y giving a bond to y Creditor, then accepted won't
 support y action for money paid &c. tho y principal
 debt is thereby extinguished. 3 East 169. 2 Barnard
 and Alderson 52. 3 John. 202. 5 W. R. 1. 10 & 32.

Quere if the Deb were a party to y transaction. 2 Barnard
 vs Alderson. 56. and y above case is manifestly doubted
 by the Ct. 3 East 100.

The ground of y^e distinction was, yt a bond was
 not to any purpose, money paid &c. even if y note
 or bill considered as y rep^y of money. 3) as y rep
 of money is so 3 East 172.

See here. In this liberal action and satis yt i. Deb
 debt has been paid by the Security? Of what importan
 is y manner of paymt especially to y Deb. he is discha

It is said in 1 Chy Pl 340. 2 W. 87. that he may
 have a Special action on y case for not indemnifying
 him. He cites 3 East 169. 8 W. 611. 7. W. 204. He
 don't seem to be supported by his authorities.
 Quere has such an action ever been sustained.
 "Count Broken"

If one of 2 Sureties pays y whole debt, he may recover
 a moiety of y other & as the late decisions are right

proving the ⁱⁿ Solvency of the Principal &c. &c. &c.
2^d May 1892

So that the Sureties are bound by Separate Instruments.
2^d May 1892

Where there are 3 or more Sureties and y whole debt is paid by one, or more of ym. each of those who have paid, must sue for himself and cannot join with another & so. I trust I cannot be joined as Defs. For as between the Sureties, there is no right or duty.

Quere then when there are more than 2 Sureties, and it not be more proper to resort to the Principal, to avoid a multiplicity of Suits? 22^d May 1892

And where one of a number of Sureties becomes so at y request of the others, y latter having paid the whole debt, can't compel y other to contribute at all. There is no Co. in law to ground a contribution - at least under the old law.

And where one of a number of sureties pays y whole debt, he can recover no more from either of y others, y in proportion to one of y number to y whole, tho some of y others shd be insolvent. For as between themselves there is an implied agreement to answer for the Responsibility of each other.

If one of y sureties be a Bond, with sureties, and y Principal be a stranger to pay the debt, y Principal may recover in this action of all the Principals, but not of the Sureties. For one Principal may be his promise of Repayment, bind the others, yet he can't bind y

And the Surety etc. Between Principal & Surety
there is no debt.

And a surety in an obligation may recover back what
he has paid from the Person named in it as Principal
And a Surety has contracted & debt as Agent to a
3^d Person. For as to Surety & Agent is Principal -

1st one of several Partners gives a Bond with Surety,
for a debt, and the Surety pays it, his only remedy
in this action is as the Principal who was bound
in the obligation. For the original debt is all & same
is extinguished by the Bond.

And Surety in this jointable action can't & it take
notice of & rights of & other partners in favour of &
himself, nor & they have said the Principal who
executed the Bond, or no & debt as between &
partners has become the sole debt of the Partner who
executed the Bond. And tho' the debt of & other Partner
is extinguished toward the creditor, it isn't so as
between the Partners themselves. Suppose the Stranger had
paid the whole. he is considered a contribution - is
a Surety in a worse situation -

A surety who is obliged to pay duties to & Government
for a Bankrupt or Insolvent, is entitled to & same
benefit of Payment as the Government had have been
out of the property of the Bankrupt or Insolvent.

upon arising from the concrete.

Implied assumption may arise out an express contract.
 It is when not directly in an express contract, it
 is called Implied Assumption in an express
 Sale.

In a contract to sell, it is understood that a vendor has title. Hence if any thing affecting title is concealed, and a vendee has paid in advance, a vendee may waive the contract and recover not the money paid, but money paid and title.

5 Bunn
2629
6 Bohn
5
1 Do 274
Esp D
11. or 35.

But if one with Title contracts to sell property,
but acquires later title before, by the terms of a contract,
he is required to make a conveyance, he may
retain y. money. There is no Equity in him. 1 Eq R 184.

Feb D. 35. 6. 7. ves Dⁿ 202.

As where an entire contract is made for a number of several distinct subjects, to one of which title cannot be made, according to y^e agreement, y^e vendor may recover back y^e whole amount because y^e contract can't be apportioned.

Aliter if the several subjects are agreed for at several distinct times. Here, recovery will be only for its part. & no money shall be advanced for a particular subject to which there is a defective title. It is in nature of so many distinct contracts. 4 Ch R 221.
1 Do 150. Ch D. 367. 3 Br. et P. 162.

On the last side however, recovery is only of a sum advanced, and of interest and in general no liberal damages are given in this union - The effect being

to receive the Title money and a value of
a piece of it. 2 Bl R. 1078. Ely D. 37.

If however a contract fails the main obligation
of the holder of Title, & a contract money under particular
conditions, may not be recovered. But for a contract
a contract must also be specific.

In Title at auction under business conditions containing
a Warranty or other false statement of Title, no declaration
of an auctioneer at a Title, can be admitted to contradict,
vary, or qualify such a Warranty &c. 1 K Bl 289
Ely D. 12. 37. 8.

And it seems, that a sign of the Debit to a Person
in these cases, is no defence to a auctioneer, he being
regarded as the stakeholder, who has not dealt with
a Debit, till a Title is executed. By a J. K. holder
is meant any indifferent 3^d Person, rather an agent
representing another. 5 Burr 2629. Ely D. 4. 38.

But where a person sues for damages, for non
performance, of a contract, a action shd be vs a
Principal ni the auctioneer refuses to disclose his
name, in wh case the auctioneer is liable. He
may then be considered as the Principal.

Dougl. 23. 1 Pea R. 120. 1 J R. 1133. 2 H Bl 373.
7. J R 181 5 East 449. 7. D D 247.

In the former case is in disaffirmance of a contract
in treating the affair as if there had been no
contract.

Now in the latter case, and the contract is made
in law with the Principal.

For y distinctions w i y made o things, where y contract
is still open. It not rescinded and when it is rescinded
in the part in the case 16.17.

The vendor is in some case liable for defect in quality
of the goods sold. But is subject for this cause, there
must be either fraud or warranty on his part. While
"Caveat Emptor" applies "Contracts 20"

3 B.C. 166 Pea R. 110.22 3 P.R. 707 59. 2 Case 314.

4 Ch R 421. 2 Do 179. n. 1 Do 97.

Contract formerly in Equity and was a warranty of quantity 129.
now to be implied from a kind of necessity.

But a well settled principle of law, defects arise in law
in a bond, for which an action of bond lies. It also
arises to an implied warranty, for which an action of assumpsit
lies.

Wishes if y defect can be easily discovered.

In any contract of Sale, if a piece is sold and y vendor
will deliver it in part, according to a contract, y vendor
may either deliver back y piece paid or money had.
and it is the duty of the vendor, on the whole contract,
for the satisfaction of the property, then informing the
contract.

1 St 407. Ch D 13. 14. or 41. 2 B.C. 448.

When the vendor gives a credit for goods sold he cannot
in general sue for y price, till y debt is a credit
is paid.

1 Ch R 423. Ch D 179. 48.

Wishes if y credit was obtained by fraud, as y
the venditor to be responsible notwithstanding.

The main issue of the case is, whether the vendor is bound to give credit and deliver the goods later, as if no term of credit had been fixed on.

6 John. 110.

1 Esp. R. 430. 2 Do. 522.

4. In a contract to buy for goods in 3 months
4 Post by bills at 2 mths., he cannot sue for the sum at
147. In fact of 3 mths. the goods will not be delivered.
3 B. & F. for a term of credit is not out. Then, it being
582. in fact a credit for 3 mths. But at the end of
Esp. R. 3 mths., he may have an action for damages.
N.Y. 49. in not delivering, & Bills in an action may
recover the price of 3 goods.

But after a credit expires, an action lies for the price
the goods are agreed to be paid in Bills, if not so paid.
the vendor made of the Bills. Or he may sue for
damages, on the special agreement.

2 Carries in an agreement by the vendor to accept a Security
117. of a 3^d person. If he becomes Insolvent before the goods
4 Mass. are delivered, the vendor is bound to deliver them
405. as if it were part of the agreement, that he should stand
Esp. R. 49. in the Risk.

If after a complete contract of Sale, a vendee refuses
to pay the price or to accept of the goods, the
vendor may sell them to another, and if sold for
a less sum, may recover from the first vendee
the difference of price. This is a novel rule, tho'
a sound one. 5 John 395. Esp. R. N.Y. 50.

The sale of goods not actually delivered, as where,

a vendee refuses to accept of it when tendered, & action, for a price, will not be granted, void and delivered, but for goods bargained and sold. But a symbolic delivery, as it is called, is valid to warrant of other form of action. 1 East 194. 4 Esp 61. 257. Str 506

4 Burr 2101. 5 Bohn. 395. 2 Ch. Pl 17

In an agreement for a duration or an estate, a vendee and vendor is subject to a contingency of sale, because it multiplies the reason which of course an offer to convey or sell, and prevent of tender, from rendering it non-performance of agreement. 1 Esp 2. 115.

2 Do. 268. Esp 2. N.Y. 50.

3. In a law wager in indifferent matters or event, Esp 2. 18. or 51. we saw, that in some instances, wagers are prohibited, are restrained or prohibited by acts of Parliament.

Corb 37. 729.

1 Pw C. 184. 146. 3 IR. 693.

And so money, being won at a lawful wager, is recoverable by law. Ibid.

Whether it is merely a stake for money or for any other thing is immaterial.

It is also essential to a obligation of a wager, that the event be contingent in the minds of the parties, i.e. unknown to both at the time. And if either party has a certainty of winning, it is void. As if he knew that the event had already happened in his favour.

1 Burr 500

But this at the time of settling the event is certain, is determined, and if neither party knows it, the contract is good. As wages on the time of a ship's return, when she is already lost, but the fact is unknown to both parties.

Is of a wager on the result of a suit.

Is a wager relating to any thing immovable & interest
in realty. The word is narrower than is said.
Is a wager respecting the title to land.

Is of a wager for an illegal transaction as
bribe, bribery. Is a wager with a third party
or between 2 parties in the event of an election.
Is it liable to bribery and undue influence.

Is if the wager is in restraint of marriage,
then it is a wager with no money at all.
Is a wager of goods, in such temporary restraint
as is proper.

Is a wager if a wager is itself declared void,
it is a wager upon any act or transaction which
is in its nature illegal. Is a wager on a horse race
which is an offence at Law.

Is of a wager as to the mode of playing an
illegal game.

Is of a wager raising a question of which sound
policy forbids a discussion or which is public discussion
on which a Government, or internal resources of a
State, or to an enemy the resources of war.
Is a wager of a game. Is a wager respecting the
strength of a host or the resources of a besieged
town.

To recover money won on a lawful wager from a loser
 y action must be Special ass^t. Indebitatus ass^t wh lies
 in general when debt lies, is not adapted to y case.
 It is not for money lent or goods sold, or labour done.

Ld Ray. 69. Salk. 23. Park. 338.

3 IR. 704. Esp D. 56

It is if y^d y action lies for use, and occupation
 of lands, and tenements under a lease, or agreement,
 express or implied. And a lease agreement as to Rent
 may be proved, as to y amt of damages.

14 BC 235. 2 Bl. R. 1249. 1 Mil. 314. 8 IR 327. 1 Do 378.

Esp D. 20. or 58. 165. 168.

At Law this action lies not in such cases, the debt
 will, y latter being considered a higher remedy.

Bul N.P. 137. 2 Com 509. Hob 284. 1 Ch. 97. Sea Gri 241.

There be a writing expressing y question. Rent
 paid for and admissible to contradict it. It will
 be as the R of Lands.

This action only lies where y deft, who was by agreement
 or permission of the Plff R. y Land Lord. A tortious,
 or adverse possⁿ. excludes the idea of a contract,
 express or implied.

But it lies even in favour of a Tenant at Will who
 has possⁿ as a ^{tenant}. The occupant is bound in good conscience
 to pay for y use, and can't allowed to show that y
 lessor had no Title. Esp D. 21. or 58.

And the Rule is general, it where y Def has enjoyed
 by demise or permission of y Plff he cannot
 question y Plffs Title. Ibid. 5 IR 4.

As a Tenant of his own.

One it has been said, that he who occupies part of
 a term agreed for, has lost a benefit expected, tho'
 a fault or fraud of the Plaintiff.

A person who never occupied personally, may still be
 liable, if he substituted another occupant.

And a person occupying under a deed containing an
 agreement for a lease, but not an actual lease, is
 liable in an action.

So if a lease hold over, either by himself or by a
 person substituted by him and occupying by his
 authority.

As for use and occupation is a transitory action
 since a person be made not a lord or if wrongfully
 used, a Plaintiff may recover, in the latter is mislead
 by it. 1 Saunders 570. Eob D. N.Y. 61.

2 Cases 374.

Is transitory & immovable, because a title and material

By the law if a tenant for life make a lease
 which is determined by his death, his estate be may
 recover a rateable proportion of a rent. Under the same
 principles

The cases written in the 1st of books in "Contract"

For 1st or 2d Books in "Contract" and "Principles", in the same
 & in the 1st, Eob 225. 55 02. 74.

This action it has been held, is not a contract, as a release, is he has voluntarily promised to pay, & is a gift. But not otherwise in Eng.

But a release is a deed. See 401. 3. & 600
See 401. 3.

The bringing of a charge for money due, is not an action.

It lies to recover a lawful debt, & if a stranger obtains and receives a debt, he is liable for them to the officer as for money had and received.

Then there is no express promise, and a fact, evidence & presumption not found, an Implied one, & action will not lie. As if in apt for money paid &c it appears that a payment of money was made, & consent & express or Implied, of the Def. As if I say I debt of a stranger without his consent, & action cannot be maintained. For this is a Gen Rule of Law, that one person cannot by his sole act, make another his involuntary debtor. Bull N P 130. 8. T. R. 610.
6 East 392. 1 Esp R 359. Esp. D. 85. 7. or 1767.

1 T. R. 120.

But if a Surety being compelled to pay his Principal's debt, actually pays it on being requested by a creditor, & Surety may recover the amount from the Principal as money paid &c. tho not actually requested to pay it by the Principal. In this case there is an Implied request.

But a more voluntary consent, and support, & action.

Eh D.

87. or 177.

A voluntary contract is an act done for a benefit in the mind. The promise of a certain recompense, where one renders services in the expectation say it out in the hope of a legacy. Hob. 106. 2. For 728.

After if service were rendered at D's request. In such case a promise or bounty or recompense is binding. Hob. 10. 105. Eh D. 88. or 178.

Eh D.

88. or 178.

But in general any thing done by a Person in course of his regular employment or occupation, tho' without request is not deemed a voluntary contract. As if a com. car brought to a river his goods, without order, and owner accepts them, a com. may recover for a damage of goods. For in such cases a gratuity isn't clearly intended.

But if Quare is laid down too broad. Suppose a Shoemaker makes and brings a pair of shoes to my child without request can he recover for them?

It will not lie for a breach of an agreement founded on an illegal consid^r of any kind. 55 L 242.

1 Es. 2 108. 2 H 36 380. But Mr. 10. 7. J.R. 630. 6. Do. 57. 405.

Eh D. 88. 9. or 178. 9.

But if I lend money to B. for a year or 5. tho' on an illegal consid^r, E. may recover of B. B. cannot in conscience retain it.

The action will not lie for a contract or an immoral sentence. As for use and occupation of a house for a year. 1 Bos. & P. 340. 1 Cam. 348. 1 Es. 2 3. 4 Do 197. Eh D. 81. 2.

So if the consid^r of one contract is but in

part illegal, no recovery can be had for any part
of it. As provided to a Sheriff & W.D. in consideration of a
loan of \$1000 & his permitting an escape. It is
void "in toto" Bro & 109. Ex D. 14. 182.

After a contract consisted of several distinct parts
as \$500. due for a escape. & \$500. for money lent.

For a particular enumeration of contracts, which will not
support an action. See "Contracts"

Where one has been compelled to pay money in consequence
of his own breach of duty, for a debt of another, he cannot
recover it back. As a Sheriff subjected for voluntarily
permitting a prisoner to escape. 8 J.R. 171. Pea 28/44.
Ex D. 185.

The action lies not on a promise to pay the Sheriff
for doing it, which it was his duty to do. nor on a reward
to him to pay a Sheriff for taking Bail, when it was
his duty to do, it will not reimburse. As not a station.
Ex D. 93. 187/8. 2 Burr 324. Bro & 133. Pea 28/72.

For upon a contract made to demand 3^d persons to
promise to pay money to an agent, if he will fraudulently
accept a discharge or bond due to his Principal?
Dong. 433. 5 J.R. 246. "Pow Chy." 4 J.R. 100. "Contracts"
4 East 374. 3 J.B. 557.

For will it lie to enforce an unconscionable demand?
The action is an Equitable one. ^{unconscionable} Powp 793. 116. Ex D. 245.
or 187/8.

For where there is no consideration or where it is
gratuitous one.

As to part consideration. see Ex D. 30. 186/5.

A voluntary conveyance is in itself

Not good to lie for a debt due by Specialty. The action
shall be lost on a debt. Debt or Covenant Broken
The latter being the higher remedy. & lower are merged.
Cro. D. 206. 213. Str. 1027. 1 Pow. C. 219.

423. Cro. D. 96. or 189. or Bul. N.P. 105.

And a promise by a Defendant in a Debt suit to pay
a sum in consideration of forbearance, and such.

It will not support an action. For there is a higher
remedy. Chap. 129.

Similar

As a promise by a Defendant in a Debt suit to pay
in a bond.

But such promise by a third person, is good at
Law, he is not bound by the Debt.

Chap. 129.

But a debt due by Simple contract is not merged
by a Specialty given to secure it in a stranger.
The original debt is still liable in equity.

That a contract on an illegal consideration cannot be
enforced, yet if the party who made the undertaking
has voluntarily paid a sum, with full knowledge
of the fact, and has not been coerced, he cannot
recover back the money so paid, provided he was "particeps
criminis."

Aliter in a last case if it were paid by compulsion
or in consequence of an undue advantage taken
of the Payee's situation, as if paid to avoid an
unjust distress.

Action don't lie to recover money back, paid from motives of honour, or honesty, when there was no illegality in receiving it, tho' y^e payment can't have been enforced, as payment of a just debt barred by the Stat^{ute} of Limit^s or contracted during the payee's infancy, or of the principal and legal interest on an usurious contract. On such case y^e money paid can be conscientiously retained.

But money paid to induce an illegal act, may be recovered back, before y^e action is done, tho' y^e Plaintiff is "Particeps criminis" He is allowed to take y^e locus penitentiae. Aliter if y^e act is done.

The general action for money had and rec^d will not lie if the claim depends upon a question of right not fairly triable in y^e action as a right or 194. of common or of distress or it has been held Esp 9.98. a Warranty of Jounareso. 414 Ind. 50. 2. 23.

1. 2. 23. 5. 5. 440. 7. 20. 274. 5. 2. 181. Com. 938.

The general count ant adapted to y^e case.

But as to Warranty 3. Esp. 83. 1. Felw. 688. n^o.

"Gresham's 16. 3"

The action for money had and received, lies only for money strictly so called, not for bank money, future funds, nor for Banknotes, tho' for most purposes y^e Law regards y^e latter as money. 5 Burr 25. 89. 2 Bl R. 684. Esp 9. 99. or 194.

Where one has agreed to deliver a certain number or quantity of goods, by a certain time, and delivers only a part of y^e m. he cannot before the expiration of the term, maintain an action for y^e part delivered nor can he ever recover for it, nisi y^e benefit

agrees expressly or impliedly to use of a part instead of the whole. If a whole is delivered, a vendee may demand a continuance. 7 T.R. 181. 3 Bulo. 325.

3 Johns. 334. 2 B. & D. 139. 40 or 24.

1 Cam. In a purchase of goods by Sample, if the Bulk
113. of goods sent equal the Sample, a vendee cannot
B. & D. demand to accept or pay for it, tho' there was no
348. fraud in the vendor: an implied condition of a purchase
of the bulk shall correspond with a sample not
being complied with - If paid for, a price
may be recovered back.

If one advances money for a purchase of an estate,
to which other party has a legal title, it cannot
be recovered back at Law. tho' there are Equitable
uses or Trusts limited upon a estate to other
persons. For a Ct. of Law. cannot take notice
of the Trust.

Pleadings and Evidence

When a defendant pleads the matter is Special
of Def. that declares ^{specifically} upon the agreement, so that a Def.
may have notice, yet he is sued upon it. Declaring
in General Aff. will tend to a Surprise of a Def.
2 B. & D. 130. Doug. 24. 1 T.R. 134.

or 240.

628. But a general count upon an Implied promise
334. may be joined in the same declr. with a Special
39. count, and yet may be done an both counts are
30. F. upon a same contract or claim, or an they are
354. to enforce different rights of action but in either
7 Johns. case upon a face of a record they appear to be
132. but for so many different claims, tho' in point of fact
130. 40. or 265

They may all lie for y same claim or cause. As
 Promissory Note for goods. There may be a Special
 count upon y note and a General one for y goods
 sold, money had and rec^d. 1 N R 355. 1 Selw 83.
 6 I R 320 3 Do 412. 444.

The object of y Rule is to introduce a recovery, if
 y Plt's proof shd not correspond with
 y Special count. And if he fails in ^{proving} the Special
 agreement i.e. fails in proving any Special agreement
 subsisting, he may go into Veri and upon satis proof
 recover upon the general count for y same thing.
 As Special agreement for building Def a house. action
 for y price. 1. count. on y Special agreement. 2
 General Count for labour done on a "Quantum
 meruit".

But where there is a Special and a General
 count for y same thing, if the Plt prove a Special
 agreement still open. i.e. not rescinded or not at
 at an end, but different from yt alleged, he
 cannot recover upon either count, but must resort
 to another action. He can't recover on the Special
 count by reason of the variance nor on the general
 one because there is a Special agreement still open.
 and the Law won't imply a general undertaking
 where the parties have made a Special one. The
 Special agreement, being rescinded, performance of it
 by the Plt is a condition Precedent. 2 John 230
 1 Will 117. 2 Ld Ray 757.

If taken y Special agreement proved, is one on why
 y Plt can't possibly recover, as if it be rescinded
 or waived. he may recover as y case may be
 on the General Count i.e. the Special agreement will
 not prevent such recovery. Secus he can't recover
 at all. 9 B N 139. Str 638. 1 Selw 83 n.

Thus if he make a Special Agreement by the Def.
to pay for work to be done, but not according to
y agreement, he may recover upon a "Quantum Meruit"
As Special agreement for a house to be built for
y Def. by the plff. y house is built but not according
to the Special Agreement. 1 N.R. 354. 1 Selw. 83. 4
3rd N.P. 133.

But where one has fully performed an Express agreement
for which he is entitled to a sum of money, he may at
his election, sue either upon the original Express agreement
for y money or upon a "Quantum Meruit" for y labour
done. 1 Will. 117. 1 Selw. 83. n.

This has always appeared to me to be in direct opposition
to the general Rule. Besides there is a Special Agreement
to pay a particular sum and a "Quantum Meruit"
lays on agreement to pay so much as the labour
is reasonably worth.

But if y terms of the Special agreement are not
performed by y party to whom y money is to be paid,
and the agreement not rescinded, he or his representative
can't recover upon it either by a Special or General
Count. As notes to a seaman for a sum of money ^{was paid}
if he did his duty during the voyage. He died during
y voyage & was held no money could be recovered.

"It has been determined tamen yt where a Seaman
under a contract for y whole voyage, is discharged
during the voyage, he is entitled to wages for y
whole. This being the Rule of the Marine Law. & so
it is said must govern. 5 T.R. 325 - see 2 L.R. 505.
Exp. 19249. 255

If A having agreed to perform a certain undertaking for B. voluntarily leaves it unfinished without B's consent. A can recover nothing either on the agreement or a General Count. For in the Special agreement it is rescinded. performance of it by P'ty is a condition precedent. See days 147 2 New R 51. n Exp 2 132 or 253 1 T 1890 1 Exp 10 53

In Delv. 53. n. a distinction is cited wh seems opposed to the Rule, but it cant be Law.
5' Case 320

The rule is holden to be y same, tho full performances were prevented by the act of y God. For performance is a condition precedent.

When money is to be paid upon an executory considⁿ. y P'ty must allege the day when and the place where. y considⁿ was paid or executed on his part. For y fact is distinely traversable as in considⁿ that the P'ty wd thereafter deliver. Se. y Def promises to pay. For the delivery is traversable. It is a condition precedent. i. 1 Tha 21. 2 Do 80. 5 T 1821 2 East 25th Chitl. P 258 or 680 via 2 page, ungs 2nd rule on these authorities

Aliter where y promise to pay is upon considⁿ executed. Here denying the Ex^t of y considⁿ wd be denying the promise itself or at least any binding promise. As in considⁿ of money lent. goods sold and delivered. labour done &c. Here time and place are not necessary for tho' y considⁿ must exist and be proved as a part of y contract & to give it validity. Yet it is not a condition precedent and it is not distinely traversable.

* It is necessary for the Plt^f to show in his declⁿ for what or from what cause, y indebtedness arose or accrued. As for labour done, goods sold and delivered, money lent, had and rec^d. See y Def can have no notice from the declⁿ for what he is sued. "being indebted, y Def undertook he ant ~~and~~ sufficient. Cro J. 265 Carter 276. 1st Ed 182 Cro J. 260 Esp J. 275.

It is not necessary tamen, that he shd state for what particular goods. It is sufficient if y indebtedness is so alleged. y it appears from the declⁿ y the debt ant due by Specialty or Record. As goods sold he. for labour done. he and necessities for a sick person. Carter 275 3 Buss 31. Esp J. 255.

In alleging the promise "agreed is tantamount to promised". 2. N. B. 621.

* The declⁿ must always allege a consid^r, secus ille ill. in substance. It wd be "nudum Pactum". For a consid^r can never be inferred from a promise. Esp. 225. & Esp. 255.

The allegation is general in abs^t - of a promise in consid^r of money lent to D. at y Special instance and request of the Def. is ill. It shd be of money lent to y Def. For money lent to D. implies indebtedness in D. and not in y Def.

But a promise laid on indebtedness of the Def. for money delivered to D. at the special instance of the Def. wd be good. for this made of declining

Where y cause of action arises on Request, y day of the Request as laid in the declⁿ. ant material provided tis laid after contract made and before action brot. 1st Ed 48 Ep 2 135 a 213

A Parol agreamt made subsequent to a written one upon the same subject may be used upon and a recovery had, tho it varies from the terms of written agreamt. 3rd Pohn 233 Ep 2 132 14

Where y declⁿ is founded on a Special agreamt, y agreamt must be proved copresoli as alleged, secus there will be a variance in y time of performance. This is a part of the contract. 4 East 107. 111. 8th Ed. 7. 4 HK 314 1st Ed 447 Bull A 9 145

If the promise is proved as laid, yet if it appears to have been made on different considⁿ from y^o stated, or on that stated and another, y action will not lie. It is a variance. As promise to pay 500^s for so much rice and cotton, and stated in the declⁿ to be in considⁿ of so much cotton. Bro 6th Ep 2 145 or 214

The place laid in the declⁿ is immaterial, for y action is transitory. The promise may be laid in one place, and proved to have been made in another. 1st Ed 143 11 Mod 348 Callatin 241. 243

Secus in Specialties.

Pleadings by the Defendant.

~~The~~ General Issue, wh puts in issue the whole declaration, is "non assumpsit" under wh may be given in Evi, any defence wh goes to y denial or

extinguishment of y debt or duty, and not in discharge
 of the action or remedy. As Dures. Infancy. Coverture
 Usury. Release, Paymt. Accord and satisfaction.
 A former recovery for the same thing. An award
 of Arbitrators according to the merits. A bond or
 Specialty given for y same debt, wh merges the
 former contract. *Alia 498 1 Chitty 2 175-2 2 Bur 1171*
Ed R 550. 5 East 320 4 Corp 1181.

II. Statutes of Limitations.

The St of Limⁿ is a good plea in bar, but the
 defence must be Specially pleaded: being matter of
 Law. wh don't go to the Extinction or Plt's title
 but to remedy, as tis expressed, to the discharge
 of the action.

So for y same reason Tender. Setoff. Bankruptcy
 must be Specially pleaded. 1 Saund 283 n 2 Lid 375-
Corp 147 2 Chitty n bills, 98 Corp 147. 279. 5 B & P 149 n Bail 207.
 Aliter 'in Court. by St provision these defences may
 be given in Eri under the General Issue.

So in N.Y. ok by giving notice of defence. *Code 278.*

For N.Y. Sec 24. Code.

In Eng it must be pleaded, tho y cause of action
 be of more than 6 yrs standing. For the debt ant *2d Ray*
 destroyed and the def may waive the advantage *838.*
 of the St. Besides the Plt may be within the Saving
 clause, and must have an opportunity to reply
 to it. *Valian 207. 8 5 Burr 2630 1 Ser 110. 2 Saund 63. a*

By the Eng St of Lim^t 21. Jam. 1. Ch. 6. y action
 is barred within 6 yrs from y time when y cause
 of action accrued. *So in N.Y. Code 148. or 282.*

To in N.Y. Ep 182.

When the ^{cause} ~~Se~~ has once begun to run, no subsequent event or disability will arrest its operation and the lapse of time limited will bar y action. As subsequent Bankruptcy of the Def. or Coverture of the Plaintiff. But this rule does not apply where y disability exists when the right of action accrued.

Ep D. 148. For 550. 1. N.Y. 184. 4 G.R. 300. 1 John R. 165 or 282. 85.

Ep D. 148. or 282. Valentín 86. All Parol contracts in General, in General are within the ~~Se~~ & these comprehend all contracts, except by Specialty. Hence not only mere verbal agreements, but Bills of Exchange, promissory Notes, and all contracts in General, tho reduced to writing, if not sealed. As well as promise implied from indebtedness, as for goods sold, and delivered, money lent, money paid laid out &c. had and received, work and labour &c are within the Statute. Carth 3. 1 Show 340. Ep D. 148. or 282. Valentín 86.

So of debt for rent reserved, on a Parol demise, but not of Rent reserved by Deed. On the one case tis a Parol contract, in the other a Specialty. Hutt 109. Valentín 86.

For does the ~~Se~~ extend the debt w y Chff. for an escape is not founded on any contract, Express or Implied, between Pth and Def. It arises from his Breach of duty. 1 Saund. 38.

Given by Court Statute, an act w a Chff. must be put in 2. ym.

For to debt on awards, for y same reason as y last 2 Saund. 64. Valentín 90-91.

For to debt vs the Shff. for money lent 2 Mod
 on Est in Pl's name, it being founded not solely 212.
 on contracts but on neglect of official duty. Ballantyn
 1. Abod 246. Contra. That it don't extend to this - 91.
 case. But that case vs the Shff for bringing y
 money into Ec. "per Quod" wd not be within
 the Stat. The ground of this distinction is hardly
 tenable. Contra 20
 83.96.

And a debt barred by St. cannot be set off
 vs other debts. as it will not support an action
 it will ^{not} bar another debt. 2 Str 1271. But N.P. 180.
 1 Selw. 139. Pea Re 121. Ballantyn 94.

There is an exception in the Eng Stat of such ^{accounts} actions,
 as concern the trade of merchandise between Merchant
 and Merchant. and Merchant and his factor.
 Exp D. 148. or 283.

The exception is holden to extend to all Inland
 Merchants as well as traders abroad.

So also to cases of Mutual open accounts between
 persons not merchants, when there are items on
 both sides, in wch case y item within 6. will
 take all the others out of the Stat. Bul N.P. 149.
 6 Str. 149. Bern 486. 456

Every new item of credit given by one party to y other,
 takes the account out of the St. it seems. 12 Str
 concludes vs the party giving the credit. Mats. P. 211.

But as between ^{persons not} Merchants, if the Dem's are all
 on one side, y case is not within the exception,
 and the Dem's wh are of more than 6 yrs standing

are within the Exception. 6 S.R. 89. Ballan. 70. 82.

But where an account is stated and agreed, an action more than 6 yrs after, is not within the Exception whoever are y Parties. Merchants or others. For the Exception embraces only open accounts. There is no impediment to a Suit when y account is liquidated. 2 Sanna 124. 2 Mod 312. 1 Do. 270.

2 Ber. 400. 2 John L. 200.

Whether an action for contribution by one of 2 obligors, who has paid the whole debt, vs his Coobligor is within the Substatute.

Quere what's y ground of this Doubt?

It has been holden in N.Y. that the So is a bar to an action on Judgment rendered in a neighbouring State. 5 John 132. 2 S. N.Y. 283.

Sed Quere? if such judgments are regarded as Judgments and as Records by y constitution of the U.S. as they must be now. see 7. Cranch. 481. 3 Wheaton 234.

"Debt" 10. John 121. 8. Do. 173-

2 Burr 959. The actual issuing of a Writ is regarded as y commencement of a Suit within y So and y time of issuing, may be proved, tho it came from y Test or fictitious time, as where the test is before the expiration of the time, but the actual issuing after. Ballantyn 118. 23. Corb 454. East. 232. 8 Mod 109.

The commencement of a Suit within 6 yrs don't prevent the Statutory Bar, ni it be proceeded with. to Judgment, thereby suing out a Writ within the prescribed time therefore

don't prevent the It from barring a subsequent
suit for the same cause.

Ed Ray 883.

3 PR 662.

Millican

Millican 257

Exp D. 152. 290. Str. 550. Bull 157.

By the Eng It if the Plt^f suing in time, obtain
judgmt wh^{ch} is reversed or verdict wh^{ch} is set
aside on motion in arrest, &c he may bring
another action within one yr afterwards, y delay
being occasioned by the Law. and unavoidable.

Cr Ch 294. 3 Lev 240.

Suit by Ex^{or} within one yr after decease of Testator
he having died within 6 yrs. has been holden
to be within the Equity of y last provision, tho the
Suit is brot after lapse of 6 yrs. Exp D. 286 N.Y.

Str 907. Bul N.P. 152.

There is a Saving in the Eng It, of y rights of
Infants. Femmes Coverts. Persons non Compos Mentis
imprisoned or beyond Seas. where y disability
existed at y time, y cause of action accrued.
Infra.

In such cases they may respectively sue within 6 yrs.
after the disability is removed. In the saving
clause. no other actions on the case are mentioned
expressly, yⁿ (Moses) for. Infra.

But y clause is extended in construction to
Apomsit- Exp. 149 284. Str 830. 2 Saund 121. Sub.

Ballantyn 181. onw. 2 Lum. 121. 2 Mod 71. Exp D 149.

There is a Saving in the It 4 Anne.
where y Def is beyond Seas. Exp. D. 150. or 285.

That y def's absence is not within the St 21.
 Sam. 1. see 1. Lev. 143

In Eng. Ireland is holden beyond Seas. and within
 y saving clause. Scotland is not considered.

Infants and other Plffs within y saving clause,
 of 21. Sam. 1. are not prevented from suing during
 their disabilities, imprisonment and absence but only
 enabled to sue afterwards as provided by y act.
 3 Mch 145. 2. Saund 117. g. 120. Esp D. 149. 50. or 285. 4

Where there are Jo Plffs, if any one of ym is within
 y Seas, when the right of action accrues, y absence
 of the others does not bring the case within y saving
 clause. For any one might bring the Suit for all.
 4 PR. 576. Esp D. 148. or 284.

The saving clause extends not only to Foreigners residing
 abroad, but to all person & residing beyond Seas.
 It continues till y return within the Realm.
 3 Mch 145. 3 John 203. Esp D. 150. 285.

Under the St 4 Anne. and of N.Y. y return of y Def
 takes y case out of the saving clause, and y Jo
 then begins to run tho he shd afterwards go abroad
 again. John. C. 70. Do. 65. Esp D. N.Y. 285. 6.
 1 Mch 34. John.

But y return must be such as to afford y Creditor
 an opportunity to sue, or y case will not be taken
 out of the saving clause. A Secret Return will not
 have that effect. 3 Mass. 271. Esp D. N.Y. 285.

In applying the St of Lim given y "Lex Loci", ~~where~~
 don't govern. but y "Lex Fori" governs.

As a Parol contract made in Court, both parties then residing there, may be sued & a recovery had in N.Y. within 6 yrs. tho' the 3 yrs limited by the Court. It have elapsed and e converso.

3 John 263. 1 B.C. 138. 11 Bille, 50.

Held in Pennsylvania yet the Pity living in Carolina, 6 yrs. didn't bring him within the Living clause in cases of absence beyond Sea. 2 Dall 218. B.C. 285.

When y action is to recover back money paid by mistake or on a consideration wh' happened to fail & y &c attaches from the time of Paymt. Long. 330. Talk 431. B.C. 2. 100. 1. or 387.

So generally where money is received by one who has no right to it, or who can't in conscience retain it.

In a Promise to pay money on demand, it begins to run from y time of y promise made.

With regard to a Subseqt acknowledgment taking y case out of the St, see the following cases.

As the St don't extinguish y debt, a new promise within 6. yrs before suit brot, is a Revival of y promise and takes the case out of the Statute.

Gibbs 120 2 B.C. 700. Bull. 149. 1 Bull. 151. 1 Bull. 155. 1 Bull. 157. 2 Bull. 8.

It was olim held contra, nisi upon a new consideration,

Hence a devise charged with a payment of ^{the} Testator's debts, takes y debt out of the Stat in Eng. circa 148.
 Prec. Ch. 385 2 D. 1573. 2 D. 285.

So a new promise to pay the whole? Def of ability to pay, if the Pltff will give him time - 3 D. 215
 Bacon 189 - 4 Johns 231. 2 D. 285.

So of a new conditional promise, as "I will pay you" if the condition is performed
 5 Mod 426 2 D. 1572. 2 D. 285.

Sed Quere as a conditional promise of a certificated Bankrupt. 2 D. 158 2 D. 311.

But a new promise to the Exr will not support y action on "Non assumpsit" infra 6 yrs or sex annos where the promise (made) laid was made to the Testator. The new promise is out of the Issue.
 It is no renewal, because tis made to a diff person.
 3 East 409 2 D. 157 1101. Bacon 189 190.

An acknowledgmt of the debt within y time limited is Evi of a promise and thus satis to take y case out of the Stat. 5 Mod 426 3 D. 1573. 2 D. 1573 1104
 1 D. 1573 1104 2 D. 1573 1104 2 D. 1573 1104.

So where the acknowledgmt is the slightest imaginable as I'm ready to account, but nothing is due you -
 2 D. 1573 1104 2 D. 1573 1104 2 D. 1573 1104.

So an acknowledgmt after Suit brot has been adjudged Satis for the purpose - 2 D. 1573 1104.

So an acknowledgment of the debt to a 3^d person,
as to Clerk. to P. to atty, tho the Def. also said
it he was discharged by Bankruptcy & paper of ames.
3 Col. 111. 4 East. 597. Dallas 19. 2.

The 2 last cases seem to imply ye mere Pri of y debt
within 6 yrs. is sufficient to destroy the St Bar.
and from these and others also, it seems. that an
acknowledgment tho accompanied with a refusal to pay,
will oust the St bar. tho' was formerly, tho'
otherwise. Gill. cri. 178 2 Vent. 102. 4 East 597.

An acknowledgment taken is not "Per Se a promise
in law. but only Pri of it and if it replied "in
nomine" y replication wd be ill, 12 Mod 223. 5 do 427.
- 21 May 1721. 223. 27. 223.

But is every ^{other} ^{other} practical purpose it appears from the
Modern decisions, to be equivalent to a new ~~action~~
promise.

So an acknowledgment to a 3^d person, with y
addition I don't consider myself as owing it.
it being more than Six yrs. since.

So an offer to pay 2/6. on the S. will take y
case out of the Stat. 2 bank 11. Dallas 182.

There on Principles. may not the Def offer a compromise
without prejudice?

But a confession of Noncompliance with one's
undertaking is not sufficient, as it don't show
yt there was a cause of action within 6. yrs.
As by a Subscriber to a publication yt he had

refused to take it, because it didn't answer his Expectations.

It was once determined by an application by Def for Leave to plead, stating that he hadn't been called upon for a paymt, since the bill became due wh was more than 6 yrs. before, was proper to be left to a Jury as Pri of an acknowledgmt. 1 East 14. 5th Ed. 1. 220. 2d Ed. 1. 220.

Where can this last clause be Law? It converts the legal means of availing oneself of a Ple into a Barrier of it or makes a mode of defeating it. At this rate, wh I shd not the Plea itself of the Ple to be taken as Pri vs the Def.

Whether an ambiguous letter written by the Def amounts to an acknowledgmt is a Question to be left to a Jury.

Aliter if not ambiguous.

Part paymt within 6 yrs is an Implied acknowl-
mt and will take the case out of the Stat. 1 East 14.
1st Ed. 1. 220. 2d Ed. 1. 220.

An acknowledgmt by part paymt or Secus,
by one of several Jo Debtors, debtors, is Pri of a new
promise by all and will take a case out of a
Stat. 1 East 14. 2d Ed. 1. 220. 3d Ed. 1. 220.

So the the party paying (ut Supra) and a party
to the Suit, a case is taken out of the Stat. as to
the others who are sued.

2 Bents 257. wd seem Contra but it is not. The

m of finding governed the case and that was, that one of the Defs promised within 6 yrs. but others didn't. The Jury in such cases ought to find that all promised.

So where one of 2 It and Several promisees had received a Dividend out of his Estate within 6 yrs. This was holden satis, to take y case out of the It as to the others. 2 W. & A. 340. 2 D. 102. n. 287.

The Def to take advantage of the It must plead it. For the It don't destroy the debt, but only takes away the remedy, and it may be waived.

Aliter in popular actions on Penal It. In these cases the right of action accrues on bringing y action. There is no cause of action, ni brot within y time limited or 2 yrs. by Statute.

Begin here

So tho y cause of action shd appear on the face of the declⁿ to be of more than 6 yrs standing, for the Plff may be within the Saving Clause I must have an opportunity to reply to it. Besides the day laid in the Declⁿ is immaterial.

Si vas olim M^o Secus.

So an acknowledgment by one of 2 partners after dissolution, is satis to take it out of the Stat. with regard to the other. 6 Geo. 2. 17. 3 D. 102. n. 287. 2 W. & A. 340. 2 D. 102. n. 287. 2 W. & A. 340. 2 D. 102. n. 287.

So on a promise to do a collateral thing on request.
For the action don't accrue till y request is made.

So whenever y right of action is to accrue, upon y performance of any condition precedent.

But where y right of action accrues at y time of y promise, made "non aft" is good Plea. Ex on a promise to pay money, on demand, or on request for y right of action accrues immediately without request or actual demand. But 151.

But action non accrevit" is good in both classes of cases. For the it always attaches from that time, an it is y time of y promise made or not. This ergo regarded, as y safest and best form. But 151
Ex 111. 274. 2d ed 67. 126. Plea. 215.

The plea must conclude with a verification. For it is a Special. plea. & tantum to an aff. allegation y six years have elapsed." since Je. 1st ed 283.

And it must be left open^{as}, all pleas, alleging new matter must, y the Plt may have an opportunity to reply to it. Specially.

On Debt or Simple contract, y Ple may be given in Plea "on Nil Debt" or ^{not} pleaded Specially
2d ed 101. 55. 1st ed 278. 2d ed 283. 2.2.

If the plea go to y whole decl.ⁿ & is ill as to part of the demand, it is so as to y whole. As promises

to deliver such a deed and also on a diff. consid^r.
 to pay 100 dol on request, alleging a subsequent request.
 Plea: Non ass^t infra &c. This being bad per se
 as is y^e Def^s obligation to deliver a deed, it being
 a collateral act. & the action therefore accruing
 on request only. is by consequence bad for y^e whole,
 and Pl^{ff} must recover both demands. 1 rev. 48.
 Bacon 225.

The Plea must deny the promise &c. within y^e same
 number of yrs. that the Ct prescribes. Hence Non ass^t
 infra, Decem annos the stronger y^e necessary is
 ill. for it can't be traversed but by an affirmative
 P^{re}gnant. 2^d Rev. 1099. 6 East 387. Bacon 225-2.

But such plea is ill only on Special Demurer,
 as being bad in form only. In substance it alleges
 more than is necessary. 2^d Rev. 1099. 6 East 387. Bacon 228.

In an action for a continued Trespass of wh^{ch} part
 is and part ant^{er} within y^e time limited, 4 yrs in
 Eng. if the Ct is pleased, damages must be given
 only for y^e former part wh^{ch} was committed within 4.
 yrs. before action bro^t. Bac 228. 9. Bal.

3 mod 110. 1 Show 493.

In this case the plea is not ill as to part (int^{er} Lib)
 tis only untrue as to part. Hence good on Demurer.

But if in such case entire damages are given on
 a General verdict, making no distinction between
 different parts of the Trespass, y^e finding is good
 on motion in arrest. as the Ct intend^t it y^e
 damages were assessed for that part of y^e Trespass.

297.

only wh was within the So. No fault or Defect appear
on the face of the verdict.

Ball 229. 3 Mod 310. 1 Show 493.

The Def may in his Plea divide y time covered
by the Declaration by pleading y So as to part only
of the demand. As to one of 2 promises sued upon -

So in case of a continued wrong as False Imprisonment.
Bal 22. Talk 630.

In this case tamen he must answer the Rescuer
in some other way. as by the General Issue, or Special
matter. Secus part of y gravamen will remain
unanswered. see "Pleadings"

The Replication may be either General affirming
that y promise was made or that y action did
accrue within 6. yrs. before. action brot. or Special
alleging some fact wh brings this case within y.

Saving clause. as Infancy. Coverture &c. Nils 27.

Ball 179. 231. 2. 241. 150. 1 Lev 110. 2 Sid 53. 60. 3 TR

662. 1 Bl R. 268. 2 Saund 117. 9. 2 Mod 17. Str 836.

The general Replications conclude to y country as it
takes Issue on the Plea. The Special Replication
concludes with a verification, because it alleges
new matter and must be left open yt y Def may
have an opportunity to answer it Specially.

Ball 238. 40. Burr 902.

The Def as before stated, must plead y promise, And
y day of y Promise as laid in the Declⁿ shd be
more than 6. yrs. before Suit brot, y time laid
in the Declⁿ being Immaterial - Bal 223. Str 806.

Ep D 528. ante 40. 153.

But if the def in his plea make y day of y promise material, as he does by Specially alledging dates in his plea, y Plt may in his replication follow y day alleaged in his plea, tho it varie from yt in y declaration and twill be no Departures as promise laid in 1800. plea that y Writ would on such day in 1810. and that Def diant promise within 6. yrs. before y said day, is good. (if not Specially demur to. See "Pld. 10." Bal 241.2. 1 Lev 110. 143. Cro Ch 214.

1 Str 121. 10 Mod 348. Str 20. 10. Mod 340.

Is it or not good even on Special Demur? If not y Def can always deprive y Plt of the benefit of y Rule yt y day is immaterial.

This Rule implies that y action is always supposed to be brot upon the original promise when there is a new one relied upon in the Evi, for if y promise stated in the Replication were considered as a second one affirming the first, y question involved in the rule wd never arise. (ante 5)

The Rule is y same as to a place laid in y declⁿ as promise laid in the promise parit of a.

Plea non aff^e. Repl^t yt y promise was made at Tenerife beyond Seas. w^{ch} in y parit aforesaid and yt within 6. yrs since y Plt return thence, he brot his action. The Repl^t is good. Secus y Plt cant chose his venue in transitory actions, nor avail himself of the Saving in case of absence beyond Seas. Bal 241.3. 1 Lev. 143. 10 Mod 348.

ante 42.

In Count it has been to plead y St Specially, and in case of a new promise to reply to it as a new one in y same way, somewhat like making a new assignmont.

It has ^{been} much debated in cases where y^e Plff^r relies upon a new promise (to reply to it as a new one) and y^e action ought not to be founded upon it.

It was once held in the N. S. Circuit Ct for y^e district of Cent, yt it may be either upon y^e original or upon the Subsequent promise.

So have the Court & Cts held.

From y^e form of y^e Eng. Plea y^e question can never arise. For y^e promise counted upon, an tis y^e Original or a Subsequent one, will fall within y^e Terms of y^e Replication. As^t *infra* "Sex annos"

It wd seem tamen from several considerations yt in ~~the~~ Eng. y^e original promise is always considered as y^e one declared upon.

For first. If y^e new promise were sued upon, y^e decl^r must always be Special wh is not y^e fact.

II. How it wd be possible to count Specially upon y^e new promise when implied from an Acknowledgment - more especially when Implied from a mere act as part Paymt.

III. Where y^e original promise was a Special one, it wd be necessary to alledge that Specially and y^e consid^r of it as y^e consid^r of a new promise, and that is never done.

IV. A promise made to a 3^d person takes y^e case out of y^e St.

V. A promise or acknowledgment after Suit bro^t

has been held. Satis to oust y^e St Barr.

VI. The rules as y^e day and venue imply y^e action is brot on y^e promise. Pg 57.

By St 21. Jam. 1. all action on y^e case re for Sland^r account and Replevin are limited to 6. yrs. Assault and Battery and False Imprisonment to 4. yrs. Slander. to 2 yrs. Entry on Land 20. There is no Limitation to actions on Specialties.

III Accord and Satisfaction

Accord and satisfaction is an award executed and performed is a good plea in ass^t. Esp D 147.

279. Ch. Bills 198. Id Ray. 153. Pow C 457.

1 Selw 135. 7. Mod 144.

Accord is called a satisfaction agreed upon, is an agreement for giving or accepting a collateral satisfaction of a claim.

Accord is an agreement, satisfaction is the C^{on} of it.

3 Com 15.

Whether it may be given in Civ under the General Issue of "non assumpsit" y^e opinions are contradictory. But on principle and weight of authority I think it may be. for it goes to the extinguishment of y^e Indebtedness.

ante 38 or ante. Id Ray. 366. 1 Ch. Pl 472. 1 Selw 135.

Pla. 68. Esp 181. 5 East 330. 12 Mod 376. Com D acct 4.

But an accord not executed is a bare agreement unexecuted to accept a collateral satisfaction, is no Defence. Esp D 147. 277. 80. Jones 6. 1 Selw 135.

3 Co 79. B.

But this Rule supposes 1st as to Simple contracts y^e right of action to have accrued, before y^e accord made. For a Parol contract before tis broken, may

be discharged or waived by a bare Parol agreement.
 Aliter after a Breach. see contracts 184. 1 Pow C 412.

Cro E 383. 4. Mats 234. Com D R. 2. 9. 13. 1 Selw 135.

6. 12. Mod 538. 1 Mod 262. Eb D. 157. 2 mod 44. Post 68.

This defence is pleadable to all actions on Simple contract, and is good to all Personal actions for damages. 6 Co 44. Cro E 100.

To make y defence effectual y accord must have been fully executed. Part Est of an accord with a promise to perform y rest. ant sufficient. Eb D. 230. 2 Ibra 67. Cro E 364. 9 Co 79 B. Sel 135.

To tender of performance don't make this defence available. For tis still not a satisfaction. Nothing under this head is allowed as a defence ni an accord fully executed. 1 Sel. 135. 2 YR 24. Eb D 147. 280.

A New contract alone cannot be pleaded in satisfaction of the performance of one of y same kind, ni it appears that the new. contract is in some respects Cro E better for y Pltff. yn y former one. as y shortening 729. y time of payment or in some other way. Eb D 230. Hob 8. Aliter if a Specialty is given for a Simple contract debt.

Thus one bond cannot be pleaded in bar of another unless ut Supra.

So of 2 promissory notes bc. for one executory contract given in exchange for another of y same kind (ni ut Sup) can in no proper sense be deemed a satisfaction as tis only substituting one cause of action for another of y same kind to no purpose.

Whereas y satisfaction must appear to be a reasonable one.

1 Selw 135. 9. Co 79. 6

But in y above cases if a recovery and satisfaction are had upon y first contract, it is a Bar & trust upon the Second.

Suppose a recovery (ut Sub) without a satisfaction.

And tendering a Security and alone sufficient as giving a new bond with Sureties, for a former one with none. Co b 230. 2 Ibrd 67. Cro E 727. Sed dare.

So y satisfaction must appear to have been good & a valuable one. Hence it has been holden yt a release of the Equity of Redemption is no satisfaction of a legal demand. It is deemed of no value in Law. Co b D 230. 2 Ibrd 67. Litt L. 332. 2 Mils 80.

Quere at y time

For y Mor is considered as having no property in it. Sed Quere at this time.

So y satisfaction must appear reasonable (or it must not appear unreasonable) & complete. Ergo where a contract is for a sum certain, payment of a less sum on the day and at y place appointed for payment is no Satisfaction. The Insufficiency of the alleged satisfaction is sufficient, It cannot possibly be so. 1 Felw 36.7. Co b D 230. 2 Ibrd 67. 3 Co 17.

For 426. 3 East 232. 2 John 448. (Contra 2. J.R. 26 argo.

But this doctrine cannot be Law. 2 East 232.

But y Ct cannot enquire into the value of y consid^r and hence y delivery in pursuance of accord, of an article of a different kind or quality from yt contract for, tho' actually of less intrinsic value, is a satisfaction As Specific articles in satisfaction of a sum of money. One Specific chattel for another. &c. For one may be as valuable to the Pltff as the

other. Eob D 230. 2 Ibrd 67. 3 Co 117. 9 Ibrd 79.

And paymt of a Smaller for a larger sum of money before the day of Paymt is pleadable as a satisfaction.

So paymt of a smaller sum at a different place from that appointed for paymt as a Substitution of a different time or place. may be advantageous to the Pltfs creditor. Eob D. 147. 230. 280. 2 part 67. 3 Co 117. 2 Lev 87. 4 Mod 88. .

Accord and satisfaction of a Bond, it is said, is not a good Plea. But accord &c of y money due by the Bond is good. For a bond being a deed can be discharged only by Deed, or Performance.

Eob D 231. 2 h^e 67. 2 Milr 86. 6 Co 43.

5 Co 117. b. Cro P. 254. 650. 1 Pow C. 426. Yelv 492. 4 Bac 87.

The last Rule affects tamen only y form of Pleading y. Defence.

But the accord &c in the last case, must be before the breach of y Bond. For after Breach nothing short of an acquittance by Deed is good.

Cro C 464. 198. or 193.

Quere as to the reasonableness of the Rule, see 7. East 145. 8. case of a Bailbond &c. accord &c denied under y circumstances to be a good plea. 7

Quere is it not in any case a good defence on such bond. Eob 2 h^e 68.

The distinction is given also in the Books yt to an action on Simple contract, a verbal accord with satisfaction is a good defence. but that in case of deed as a Bond, y accord must be by Deed.

o. Co 43. 2 Milr 87. 370.

Also yt in case of a deed for any thing in money
accord be is in no case a good defence.

9 Co 77 b.

I G no reason for y's defence

Quere wd it now be considered as Law?

To of paymt. 9 Co 77 b. and note the reason?

Observe these distinctions especially the last, now observed.

The Plea must alledge yt y Def paid or delivered
be in full satisfaction & yt Def accepted it as such.
Alledging paymt or delivery only in full satisfaction
is not sufficient. Str 23. 573. 3 East 207. Es's D. 229.
or 2 p^e 607.

Nor is y allegation yt the Plff accepted, be with
more sufficient. He must also alledge yt he
delivered it as such.

The safer and better way, is not to set out y accord,
as there may be danger of a variance, but to plead
only that y Def paid or delivered so much or such
a thing in full satisfaction and that the Plff
accepted it as such. Str 573. 1 Bac 25. 9 Co 80.

1 Selw
137.

5 East
230.

The Breach of a mere accord never constitutes a
ground of action, as by the creditors refusing to
accept. or debtors refusing to pay the stipulated
satisfaction, y accord being of no force, in execution.
1 Roll 129. Ld Ray 122. 2 H 36 317.

This rule may be the occasion of manifest injustice
and I G. thinks, yt if a strong case cd be made
out. Equity wd decree specific performance.

Accord and satisfaction is in law support of Plea of Payment
For payment is a literal performance of a contract. But
accord is a collateral thing or act substituted for
performance. 1 Root 75.

It has been holden that acceptance by Plff of
satisfaction from a 3^d person, is no defence.

This must subserve a 3^d person not to act as agent
for the Def. as where he purchases a bond from a
creditor. Cb D. 147. 280. 1. 300 E 544. 6 John 37.

IV. Payment

This defence may be given in law under non ass^t
or it may be pleaded Specially. La Gray 566. 217. 85. 9. 787.
1 B L 213. 2 Barn 1010. 1 Selw 146. 1 Ch Pl. 491. 6.

But ^{part} payment taken is no Plea. It is only in
mitigation of damages. Cb D. 147. 280.

It is holden 5 John. 271. 3 Abid 229. if payment of a
whole principal due, if accepted by the Plff as
satisfaction is a good plea, and that he can't
afterwards sue for a Interest, recovery of Interest
being only incidental to a recovery of the Principal.

So payment accepted of a ^{debt} Def in Suit with mention
of costs. leaves the costs of each party to be borne
by himself. 1 Carnes 66. Cb D. 281.

If a vendor of goods takes notes or Bills of Exchange,
for them, and a notes be prove not good, tho' 1 Cb R. 3.
genuine. they are not payment, if a vendor agreed
to assume a Risk & receive them as Payment, 1 Selw 277.
Chitty on B. 122. 152. 7. J R 64. 184. 6 Do 52. 5 Do 513. Salk 124.
2 John B. 68. 8 J R 457. 3 East 147. 257.

If a creditor is induced by fraud to receive a note ^{accept} or other security wh^{ch} aint good, as paymt and agrees to assume the risk, it is not paymt and he may recover as for goods sold, &c. If A sells to B an article knowing it to be unsound & B purchaser agrees to assume y risk, y Sale is void, this is by way of analogy. 1 Esp R 430. 2. Do 522.
Com. C. 38. 6 Johns. 110

So on other contracts as for labour done, &c they aint considered as paymt., because not cash. They are only Securities for y paymt and not like Banknotes. Besides at y time of delivering them, y time is in most cases future

It is ergo impossible to consider them as paymt in tis expressly and y risk assumed by the creditor. The Bills in such case have generally a time to run.

At O Law. to debt on Bond, paymt after y day was no defence, for as tis not a strict performance, y contract is broken, and the Def is liable for y breach. But now by St 5 Anne, Ch. 15. S. 12. Paymt after y day is a good plea. Esp D. 225. or 2 p^e 62.

In Court it has always been a good plea, tho' were no St on y subject.

If an obligation is payable on a day certain and paymt is made before that day, the obligor sh^{al} not plead paymt before the day. For the Issue if found vs him wd be immaterial. But he

may plead payment at y day and proof of payment before y day. or after y day will support the Plea,
1 Bb R. 210. But N P. 174. It 394. 2 Burr. 944.

2 Mh 173. 2 Linn 319. n. 6. Esp D. 222. 1st. See 62.
But under the St of Ann Sub. nothing short of payment (after y day) is a good defence. Hence tender after y day is not a good plea.

Secur in Court.

Where payment after y day is pleaded, it must be of the whole amt then due, or the plea is ill.

If there are different debts due from a debtor to one creditor, y debtor in making may apply it to wh he pleases. But if he does not make y application to either in particular, y Creditor may elect for himself. It 1194. 1 Bern. 607. Esp D. 228.
or 1st 2d 65. Cro E. 68. 2 P Wm 308.

So if one pay money as Earnest, y other party cannot make a different application of it.

Equity

But in Eng. this last rule admits of some qualification. Thus if one owe another 2 debts and one draws interest and the other not. & the Debtor makes a general Payment, Eqty will apply it to y one drawing Interest, that being the presumed intention of the Debtor. 1 Bern. 24. Esp D. 228. or 1st 2d 65.

This Rule dont appear to be founded on the common principles of Equity.

Where one was due by Deed and another by Judgmt & the purchaser of the debtors Estate fixed a sum, generally, it was applied in Ehy to the Judgmt

debt as yt only incumbered y land. and y paymt was intended as purchase money.

As to debts due by Bond to wh y Eng L^t of Lim^s don't extend - for presumption of paymt before y time. vide Evi. Where it has lain dormant durng 20 yrs. y Jury may presume paymt.
Evi 30.31.

V Coverture

Pld^r
-73-

That the Def was at y times of contracting a Teme Covert. is a good plea. tho y defence may be and usually is, giving in Evi. under the general Issue. Plea of coverture don't amt to the General Issue. tho it may be given in Evi to support it.

1 Selw 134. 12. Mod 110.

VI. Infaney

That y Def was an Infant at y time of contracting is a good Plea. But this defence may also be given in Evi under the Gen Issue. Infants aut in General bound by their contracts, ni for necessity and to such as do not bind them, they may plead their Infaney. "Parent Child"

1 Selw 138. 2 Lev 144.

VII Bankruptcy of the Plff

In Eng the bankruptcy of y Plff is pleadable in bar. when the debt was due before his Bankruptcy.

look.
439-

Secus if it accrued afterwards. In y former case y Bankrupt has ceased to own the debt, it belongs to his assignees - not so in y latter. Bul N^o 152. This defence is given by y Eng L^t. We tamen have no such L^t in U.S.

VIII

Bankruptcy of Def

If y Def has obtained a certificate of Bankruptcy he may plead it in bar of all such debts, as might have been proved under y commission and such only. *Esq D. 157.*

1 PR. 599. 3 Milt 262. 2 BL R. 764.

Ch Bills 198. 283. N. 2.

The debt remains still remains due in conscience and is still as satis consid^r. Its support y promise to pay it.

2 PR 765. 2 HBB 116. Cowp 544. 7. John 36.

Doug 182. 378. 591.

This defence like y 7th must be specially pleaded, and cannot be given in Evi under the gen Issue. for it it don't go to the extinguishment of y debt.

We've no Bankrupt Law. How far acts of Insolvency passed by the Legislature of any of the States, constitute a bar to actions on contract, has been a question much litigated, as a power to establish an uniform System of Bankruptcy is vested by y constitution of U.S. in congress. Besides no State can impair the obligation of contracts.

But tis now settled by the S Ct of y U.S. y^c such acts for y purpose of discharging the person of the debtor are valid, but for the purpose of discharging the debt on the debtors property, they are unconstitutional and void. 1. Wheaton 122. 209. 6. ibid 131.

4 Wheat 122. 209.

And were an such a Ct of another State can have y effect of discharging even y person here in favour of a citizen of y State. It seems not.

3 Cases 154. 3 Dall 369. 1 Do 229. 188. 261.

3 Map 77. 1 East 6. 2 John 235. 1 Day 130. Map 198.

(2 Do 463.) Ch. B 59.

Or where such a debt accrues here, can such
 It of another State take any effect in in y^e
 state? Such a It affects the extent of y^e remedy.
 and can operate only as the Lex Loci operates
 in other cases. - in that State where ^{It was} made.

IX. Release.

This in the present action, and in debt on Simple
 contract may be given, in Evi, under the Gen
 Issue. or it may be Specially pleaded, for it
 extinguishes the debt 2 Burr 1010. 3 To 1353.
 La Ray 556, 57.

The Repli^t denying the (fact) plea is non est factum
 Feb '47.

It must be pleaded as being by Deed, for a release
 strictly speaking, cannot be but by Deed. & after
 a right of action has accrued, a Personal discharge
 or Waiver is no defence. Co D. 308. or 2, 5^o 167
 1 Bro. 42. 13. Co Ch 353. 4. Com E 2. g. 3.

Before action has accrued, tamen, it may be.

A Release of any claim or claims, as of "all demands,"
 will not discharge a duty afterwards accruing: for
 where there is no duty subsisting, there is nothing upon
 wh^{ch} such a release can operate as General Release
 in case of a Consent of Warranty before eviction.

La Ray 575 - Bnls & P. 66. Gulik 171. Ch. Biles 53.

Aliter if it were a release of the contract or promise
 or of all promises or contracts.

La Ray 55 Is a release to the Drawer of a bill of exchange
 Co D. 308. after tis drawn, but before acceptance or refusal
 to accept. don't discharge him for he aint charged

till y bill is dishonoured by the drawee. Secus
of a release after the dishonour of the Bill.

A Release tho given after suit brot, is a good
defence. If after the last continuance, it must be
pleaded "pui dareu continuance" and pray Judgment
if the Plt ought further to maintain his action.

4 East 507. Belk 141. Selw 47.8. Bul AP 309. 3 T.R. 80.

As to y effects of y words "all demands" &c and
in what cases they are constrained in construction

see 4 Bac. 289.

"Covent Broken" "Contracts 127."

Carth 119.

3 Col. 74. 2d Ray 225, 663. Pow 377. 58. 92

These are y most comprehensive words of Release, including
not only subsisting rights of action but also debts
in presentia the "solvendum in futuro" as a penal
bond before breach. or a promissory note payable in
future.

Aliter ut ante of demands afterwards accruing - as
subsegt Rent. a subsegt breach of covenant. Then
there is no present breach of duty.

A Release to one of 2 It and Several Debtors, is in
Law a Release to both.

For the distinctions on this point. see 8 V.B. 168. 71.

But a discharge of one under the Insolvent Law
ant a discharge of y other. It is not y intention
of the act, wh is a positive provision operating
in favour of the Individual discharged.

X Specialty given for y same Demand.

A bond given for y debt or claim in demand, is pleaded in bar of y action. The Simple contract being merged in the Specialty, y Plt must pursue his higher remedy.
 Bul N P 155.3 East 257. 1 Burr 9. Ch. D. Cuts 129. 2
 Ch. Pl. 434.

Aliter where a Specialty is given reciting a Simple contract, for y purpose of affirming it and of facilitating y remedy, and not with a view of substituting a higher remedy. In such y intention is not to put an end to the y original contract but to ratify and furnish Evi of it. Thus if a by deed acknowledges y receipt of the property to account for, y action of Account will lie. 1 Bos & C. 423. 5 R. 176. Con D. 190

The debt is not merged in a bond given by a Stranger. It is intended only as additional Security.

This defence may also be given in Evi under y Gen Issue. As a Judgmt Record may be, for it extinguishes the debt or contract.

XI. Former Judgment Recovered.

A Former Judgmt recovered by either Party vs y other in an action for y same Cause, or thing, may be pleaded in Bar. to the action or given in Evi under the General Issue. Here the original contract is merged in the Judgmt. 2 Burr 1010. Pl. Evi 34. 5.
 Bul N P 232. 6 Co. 77. 2. 209. 2 Pl. R 827.
 1 Ch. Pl. 170. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

But a former recovery on any collateral ground or point is no Bar to y action as Recovery vs A for fraudulently recommending B, is no bar to an action vs B. on y contract obtained by the recommendation. Bul. & R. 67. 1 Lay 22. 3 Esp. 208.

See 124. New Ori 172.

XII. Award.

An award of arbitration deciding the merits of the cause. may be pleaded or given in Evi. For such an award while in full force, has the same effect as a Judgmt. Ibid. 12. 1. n. R. 170.2.

1 Lay 170.

XIII. Tender.

Tender is a defence wh must be Specially pleaded, being matter of Law wh goes not to y discharge of the Debt. but only to damages. for y detention and costs. Substantially it goes only in discharge of the Costs. Damages for Detention being only nominal.

1 Paines 285. n. 2. Ch. Wills 120

Tender is an offer to pay a debt or discharge a duty.

5 Bac 1. Tender.

Bringing money into Ct. is depositing it in Ct for the satisfaction of the debt or duty. This proceeding has been introduced to supply the place of a Tender where the latter has been omitted or where in certain cases it would have been ineffectual.

The proceeding in such cases is distinct from bringing money into Ct. in pursuance of a plea of Tender.

in wh case tis brot as matter of right & of course
without any leave of y Ct, for when brot is not
under a plea of Tender, tis always brot by leave of the Ct.
Bac. Tender a. Bac Tender k. Its 878.

Leave of the Ct is sometimes granted by virtue of y discretionary
power of the Ct. under a Rule of practice, sometimes by
virtue of a St provision. Ibid

The effect of bringing the money in the latter case
is sometimes an order in the Rule granting leave to
proceed in the action, which be stayed, & out more usually
yt y amt of money brot in shall be stricken out of y
Debt and that the Plt shall give no Evi for y recovery
of it on Trial, yt he shall go only for what he
claims over y sum brot in. So yt if he cannot
prove a greater sum due, he fails.

The latter being the more usual, is called y common
Rule.

Bac Tender. a. m. p. 1. 24.

In general money may be brot into Ct in all cases
in wh Tender wd be a good Plea. 5 Bac 26 Tender. m.
It is a Substitute for that Plea.

Bringing money into Ct in under the plea of Tender
is unknown in y Court practice, for by our Law
tender after y day of paymt. is as effectual as on
y day. so that were so occasion for such a Rule.

A Party making Tender, must declare on what
account he makes it. Secus y adverse party cannot
know for what tis made. Lash 70. 1 Pels 174.

5 Bac 4.

2 Wils 74.

Generally declaring his readiness to pay, is not sufficient tho he has his money in his hands at y time. There must be an actual offer of it. It must be by some act and not by mere words.

1 Leon 7. 12 Mod 353. 2 Lev 209. 3 Do. 104. Bac Abr. P1. Tender

But any actual offer of y money in a bag or box is satis witht showing the money, for tis y duty of y creditor to count it.

5 Co 115. Co Litt 208. Cro. 308

Bac Tender. B. 1. 3 Pl. 084.

In case of several different debts between y same parties y debtor may apply the Tender to wh he pleases. Bac Tender B. 1.

A Tender of more ym is due, has been holden satis as "more Magis contrit in se minus" and if y creditor retain too much, he does it at his Peril.

5 Co. 145. Str. 916.

Bac Abr. Tender. B. 2.

But y true rule seems to be, yt such a Tender is good only, if the creditor don't object to it, as being too much. If he does, tis not good, for he has a right to claim the exact sum witht making change.

1 Selw. 171. 2.

Pea Eri 258. Pea R. 88. 179.

If one is bound to do one of 2 things at y election of the other, as to pay 100 Dole or deliver a chattel, y Tender to be effectual, must be of both.

Bac Abr. Tender B. 2. 1 Leon 68.

A Tender of money of any kind, made good by Law, is good.

A Tender of foreign coins is good, some taken by weight and not by Tale. Spanish Dole. French Francs.

Eng. Spanish, French, and Portuguese gold, are good
Tender. Lach 84. SalR 446. Cromb 387. Cpr 3...

^{38.}
But by the constitution of y^e U.S. only gold and Silver
coin can be made a lawful Tender by the
Legislatures of any State. Constⁿ art 1. S. 10.

Copper cents are a currency, are established by Congress.
Quere are they regarded as a Tender, in for a fraction
of a Dollar?

I G. thinks they ~~not~~ ^{are} be. They are as much coin
as Dollars and Eagles. It has been decided in some
of the Western States. They ~~not~~ ^{are} not be.

But a Tender of Banknote, if not objected to
as such. i.e. as not being Cash, by y^e creditor,
will be good, for he will be deemed to have
considered them as money, and all objection to them
as Bills, to have been waived. 3 SR 534. 2 B. 1.
See ch 3:14. 72. Cpr 315. Pea Cr 208
Cpr 161. 300 5 Bae Ten. B. 2

In 6. Mass. 18. It has been holden yt a Tender
of counterfeit money, if accepted, is good, as it
incumbent on y^e creditor to examine before he accepts.
Mass. Tnd. 10. 2. 5 Co 110. Co Lte 208. 1 Ld Ray 743.

In 6. Mass. 18. was holden yt in case of a forged bank
note, y^e receiver may have an action to recover
y^e amt. 6 Mass. 182.

See La Ray. 743. as to Bankers notes not being
considered as Cash.

The Rule supposes no fraud in y^e Party tendering
like y^e case of an unsound Specific chattel.
sold wthout fraud or wthout Warranty.

See also contra where bad bills of Exchange are given in stead of money, in y creditor assumes the risk.

6 Do 32. 1 Pl R 3. 7 T R 64. 5 Do 56.

But these are not regarded as cash. These cases are not ergo analogous. They ant payment, tho genuine.

In Comit tamen there is a remedy given by Stat in case of counterfeit money and forged banknotes.

(7) If a tender B. his debt, in condition of his giving a receipt, Cok D. 151.

It is no tender. B ant bound to give a receipt. Pea R 179. 3 Do -

If on an offer by the Debtor to pay or tender, y creditor insists that more than is named is due, there is no necessity for producing the money. It is considered as a refusal and as dispensing with y actual production of y money.

Pea R 88. Cok L. 161. or 300.

Pea Cui 259. 4 Co. R. 67.

See Quere If produced and offered, it might be accepted.

Different sums due to Several on one and the same account, as to Sailors for wages. Offer of a gross sum, including the whole, refused only as not being satis. in ant. Tender holden good for y objection wasnt to y sums being gross. and this objection was considered as waived.

Yet where y repl^{ce} is of a subsequent demand, y demand it is holden. be by a person authorized to give discharge.

Quere for what reason? Does y former refusal make any difference? It wd seem by this, that a discharge was necessary. but this cannot be correct.

The Rule probably ant Law. P. G.

Tender to a person authorized to receive, payment, is good. as to Agent. Clerk in a store &c. 184. 173 184
175

If Tender is made of part of an entire debt, & creditor by refusing it, loses his claim to Interest on yt part only. 1 Cam. 184. 30 D. 101. or 30 D. 5 Bae.
13.

Where & place of Payment or performance is appointed in y contract, tender must be made at y place or will not be good.

Co Litt 210. Bae ab Tender C

If y contract is for y payment of money in gross & no place is appointed, tender must be made to y person of y creditor, if he has left the State.

Idia. Litt Sec. 340 Com. D. Condition

3. 10

He ant bound to follow y creditor out y Realm -

But if y creditor be out of y realm on y day of payment no place being appointed, how is y debtor to discharge himself? And it be sufficient to plead and prove a readiness to pay at the creditor's residence, if he had one in the State, or 1 Solomon 30. 2 Bae M. 40.
Bae. 210 Tender C. and that y creditor was out of y State with an. & profert. It seems it was
2 Bae M. 375.

Quere an readiness generally witht naming any place ant sufficient?

It seems that Pleading merely yt y Plf was out of y State and yt y Def was and still is ready to pay is sufficient. 8 Co 92. 5 Bae 10. 10.

But suppose no time nor place appointed, and y debtor in any way discharge himself with following y creditor out of the State?

Might he not do it by having previously named to y Creditor a reasonable time & place.

Or might he plead as in the last case?

Of rent issuing of Land, if no place be appointed, tender upon y land or to y Person, is good. But being considered as part of the Issues of the Land. Tender to y Person ^{Rent} and Indispensible. 2 Bac Tena C. Co Litt 210
Civ E 48.

Bulky articles, no place being appointed, need not be tendered to y Person. The party bound shd enquire of the other ^{at} what places he. & and a tender at y places named by the latter is good. Co Litt 210. 2 Bac 116
Tena C.

Nor is y creditor in all cases bound to receive it wherever he may be met.

But if the Plf refuses to name a place & y thinks yt y party bound, may give notice where he will deliver and a Tender there will be good for if he cannot discharge himself by delivering, y creditor may compel him to pay money. He can discharge himself in some manner, and this seems y most Reasonable rule.

Tender after action brought is at Law, no defence 8. 5. 11
for it goes only in bar of the Plf's right to costs be 6. 2. 2
and ~~not~~ in discharge of y debt, and ergo tender after 4. 3. 11
action brought is too late. A right to recover costs 3. 11.

has then attached the P^{ty} to y P^{ty} by action brot.
 Bac ill. Tender. 3 n 2. 20.

The Rule seems to have no application to cases where y
 time of performance is appointed in y contract, for
 y Tender must then be made at y day "Infra"

Bac ill. Tender 2.

But in Equity a tender of debt and costs, after P^{ty} filed is good.

In Count y Rule is y same at Law, pending a Suit.

And in Eng. if the Date of y Writ is before y time of
 y tender, but y actual issuing of it, after y time time
 of its issuing may be proved to give effect to y Tender.

Mil 14.

St 038. Bac ill. Tender. 3

Pea Ri 253.

If money is to be paid or goods delivered on a certain
 day, a Tender before yt day is not good it seems.
 The Tender must be on y day appointed.

Co Litt 202. Bac ill. Tender 2. 12 Mod 531. 33.

Co Litt 14.

5 Co 14.

For after y day Bull 17. Eo 220.

¶ If money is payable on or before a certain day, a
 Tender before, if y parties meet before, will be good.

Secus as to bulky articles, for a man isn't bound to
 accept them wherever he may be met.

¶

234.
 234.
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 234.

If money is to be paid or goods delivered, at such a
 place, on or before a certain day, a tender at y place
 on any day yⁿ y last day limited, isn't good, if y
 creditor was present at y Tender. This is for y convenience
 of both parties. The creditor ought not to be obliged to

be present nor y debtor to be ready. Co Litt 211. Com D concludes
in E 14. 5 Co 114. Bac Ab Tender. D. 9 8. y

It is doubtful an on notice given by the Def 10. 4 mod
y debtor. yt he will pay de on a prior day. a Tender 421.
on such prior day. wd not be good. 12 Mod 422.

Bac Ab. Tender D.

If he be present, it is good.

But tho y creditor dont attend at y place, a Tender
in his absence on y last day appointed, is good.

Bac Ab. Tender d. 5 Co 114. Co Litt 202. 11.

2 Combs Co 23.

If thamen y creditor neglects to appear at y place,
a Tender made in his absence, is not good, ni made
at y uttermost convenient time of y day appointed
12. at y latest period wd allow sufficient time
for examining & taking an account of y money or
goods before Sunset. Bac Ab. Tender B. Co Litt 202.

3 Lev 104.

5 Co 114. For 177. Galt 624.

If they meet earlier yn yt, a Tender may yn be
made. The debtor is not bound to appear, till
a sufficient time before Sunset, or y uttermost
convenient time of yt day. If there the Plf were
there in y morning and went away, a tender may
still be made. Com D Cond^d 8. 9.

In case of Inland Bills of Exchange, y party bound
tis said is allowed till y last moment of y day.
to make paymt. Chitt Bills. 153. 1 Saund. 287.
15 R 173. Ryd 121. Hence it wd seem yt there was
a difference between such bills & notes & other contracts.
Quere?

The rule seems well established. Inland Bills, &c
must ergo form an Exception to y above Gen Rule.

But y books are silent on this point.

com 2
g. com 2
9. If y parties are at y place appointed at any earlier period of y day named, a good tender may then be made. & if ~~made~~ money is payable on or before such a day at such a place, Tender may be made at their meeting at y place on any prior day, within y time limited. Thus neither is obliged to attend longer ym is necessary.

But if from causes not within y control of y parties, paymt cannot be made, at y season of y day prescribed by the General Rule, paymt at y utmost convenient time of y day, at wh paymt can be made, is good. As contract to transfer stock wh can be done only in the established ^{hours} ~~rules~~ ^{hours} of business 2. Mod 533. Talk 624. Per 777. Baym 2 088. Due Mr. Tender. D.

com 2
211 The place of paymt being fixed, but no time appointed, y party ~~to~~ bound may on giving notice of paymt on a particular future day, make a tender at y place on that day, even tho' y other is absent. 3rd 11. Tender 2. But it must be at y uttermost convenient time if it can be done at yt times. Dyer 344. 54.

From y analogy to y^s Rule. I infer, yt a place may be appointed by the Debtor.

5 Co 114
3 Co 114. } So where one is bound to pay at a place certain, at some time during his life.

3rd 11
Ten 2. } And in both y last cases y party bound to to pay money, may on meeting y other at any time at y place appointed, make a good Tender.
co 211
202. 11.

But if neither time nor place is fixed, how is a debtor to discharge himself by tender in a creditor's absence? Holden in Chy. Ct. a debtor appoints beforehand reasonable time and place of Payment and tender of money according to a notice given, a tender is good.

3ac Mr. Tender. C. D. 2 P. 387.

12 Mod 422. 8 Co 42.

Would not this Rule be adopted at Law? ^{1st}

But if weighty or bulky articles are to be delivered, no time or place being appointed in a contract, for a delivery, a Party bound, it wd seem, shd request a third to appoint ^{time and place} them, and a tender in pursuance of ^{2d} a appointment, wd ^{be} good, tho a creditor were absent. for if the place were fixed and not a time, a course is to apply to a creditor to appoint a time, and a tender in that case according to a appointment, wd be good. There he requests the creditor to appoint one, here both.

Com D. Condition C. 3.

4 Leon 40. Co Litt 210.

But a tender to a Person wherever he might be, will not be good. Tho it wd be in the case of money. It is presumed yt the creditor can conveniently receive money at any time or place.

In the last 2 cases the Creditor shd refuse to appoint wd not an appointment by the debtor of reasonable time, make a Subsequent tender valid O. G. Hunt No.

Consequences of Tender.

In general Tender and Refusal go in discharge, not of a debt or duty, but of a damages. (i.e. a nominal damages).

Smith
133

for y detention of y debt and Costs. Substantially all its effect is to deprive the Pltff of costs. and to entitle y Def to them. The damages mentioned in vials. This is variously expressed. - sometimes y action and sometimes y costs are said to be discharged.

1 Lev. 209.

3 Bb 303. Pea Cr 258.

Com D. Pleas 2. M. 38. 1 Doug. 21. 322.

In such cases if y contract was for money, y Def must hold himself in readiness to pay y the money when afterwards demanded.

But where without any preceeding debt or duty, one makes a grant with condition for y payment of a sum of money to Grantee by way of gratuity, Tender discharges y Lien and with it y whole personal duty, for there is no duty independent of the Lien. "Mortgages 9"

Dow M. 0054.

5 B & C Tender H. Co Lile 207.

Ex D. 245.

10 Co 79. Litt L. 335. 38.

The same Rule holds in many other similar cases.

Co Lile 207. 9. 4. Co 79. Galt 15.

Ex B. 755.

That is y effect of y condition is, yt y grantee may hold y property, if y money is not paid. The Tender discharges the Lien and there is no debt. Such wd not be y case taken if y mortgage was given for a debt.

If money due on a forfeited mortgage is tendered, it stops y Interest from y time of y tender, if mortg has kept y money and made no profit of it.

The Eng Rule requires 6. mths notice to y Mortgagee.

Wd the Rule prevail at Law? I think not. Tender

being after Forfeiture. The Tender in season stops y
Interest even at Law. an y money is kept or not.

But when y obligation or contract is for y payment
of an Existing debt or duty. y debt ant discharged by y
Tender. but only y costs. &c.

But a right to costs &c. tho cost by Tender and
refusal, may be reversed by a subsequent demand of y money,
if y debtor then refuses or neglects to pay it.

5 Bac Tende. §. 13 -

1 Rob' 207. 5 Bac 13.

And if y debt before Tender earned Interest. y Interest
will again accrue from y time of y demand.

If y def prevails on a Plea of Tender, y Plff takes
y money b't into Ct. and y Def is entitled to
costs. Bac Ab. Tender. &c.

Where does it make any difference in practice, an
y plff takes out y money or not? Not in Court,
at least. Costs are there taxed for y Def of course
w'ht enquiring an the Plff has taken y money
out of court.

Where one is bound to deliver bulky articles as com.
a Tender duly made discharges the whole duty. Bac
or obligation as it wd be unreasonable to require Tenders.
y Def to hold himself ready to deliver such articles
on demand. He may have them, when Tenders, 9 Co 58.
If y creditor is absent or refuses, he may leave Co 210
them where he makes y Tender. He ought not 207.
to be compelled to house ym. as a load of Hay. 2 R. 10
524.

These Rules have been supposed to hold generally, as to all Specific articles

Quere on principles in they are bulky as gold watch — Diamond Ring. wh are easy to keep.

! Root 58. 55. 64. 198.

In general Tender is a good defence in all cases, in wh y debt or thing contracted for, is certain. As in Debt Covenant. Apt. for a sum certain.

Bac Ab Ten. 0. P. 0- P.

So in an action for y & nondelivery of certain Specific articles as 100 bushels of wheat

Specs of articles not ascertained as a due bill.

This Rule is not universal. Where no Individual is entitled to y thing demanded till action brot. As case of a Penalty given by St to any who will prosecute. Tender is no defence, tho y sum is certain. In such case no one is entitled, till suit brot. and then tis too late to tender. But y Def may bring y money into Ct. under y common Rule. Bac Ab Ten. 0 P 2 St. 1217.

In general in all cases in wh Tender wd be a good Plea, money may be brot into Ct under y common Rule. Ibid.

In assumpsit or Covenant, for uncertain damages, Tender isn't a good Plea. As damages for not building a house for y Plff according to contract or for doing it negligently &c. or for driving immoderately a horse let, or for not making repairs. For, in such cases the sum isn't.

ascertained and neither party has y right to determine
y amt alone.

2 Burr 1120. 11 Mod 270.

Talk 596. Str 787. Bac. Ab. Sen P.

So for not performing labour or business for y Plff,
according to agreamt.

But in Indebitatus apt Tender must always be
a good defence For it is ever bitt for a sum certain
or one wh may be ascertained. As for money had
& received, paid, laid out, &c lent, &c.

Talk 23. 597.

Bac Ab Tender P.

Ld Ray 255.

5 Mod 128. Str 576.

So in debt or Covenant for rent, for this is for a sum
certain.

Talk 596

Contrn formerly. 2. Ray 255. 12. Mod 187. 187. But how was
this? Id certum est quod potest reddi certum. If it can
be made certain in such cases. by reference to a General
Standard, Tender is a good defence. As y common
price of labour or of goods. &c. not like y case above
of not building a house, for that depends upon the
exercise of reason.

In other words, where y sum wh ought to be paid
can be made certain (when the facts are ascertained)
by mere computation, tender is a good plea. Aliter
where it depends upon the exercise of Indgmt or
Discretion.

5 Bac Ten. P. 2 Burr 1120.

This seems the most definite and best Rule.

Hence it anto a good plea to an action on Bond,
of Indemnity, for the performance of a collateral agreamt,
He is entitled to damages wh cannot be ascertained
with^e y Indgmt of a Jury. &c. 12 Mod 598.

For bringing money into Ct in Gentry vs Mor.
of land by St 7. Geo. 2. see 5 Pl. 31. 43. 2 Ch 521.
Bac

So for Tender of amends by a Notice of Peace, under
St 24. Geo. 2. Ch. 44. for injuries done in the execution
of his office.

5 Co 76. Tender of sufficient amends is at C Law. in Replevin.
2 Ch Pl 521. 2. in case of damage done by Defs cattle, allowed
probably because y Injury is involuntary. But he
must tender enough. i.e. what a Jury think sufficient
or it will not avail him. The damages are uncertain.
Tresman 339. 527.

So by St 21. Jas. 1. Ch. 16. Sec. 5. in cases of involuntary
trespass, tho at C Law. it is no plea, in any case
of trespass. Not I think, ni pleaded with a Disclaim
St. 529. 5 Bac Tena. P. L. 3 Lev 27.
2 Ch Pl. 521. Text n. a.

Ques. Where an it can be pleaded in any involun
trespass. ym not done by cattle? St 594.
2 Ch Pl 521. 2.

I think it cannot be, Tho it seems merely to
extend y defence, to Trespass in those cases, in
wh it was good at C Law. in actions of Replevin

In trover for money converted, money may be brot
into Ct. under y common Rule. 5 Bac Tena. P.
St 142.

Ques. can Tender be pleaded in y case? Is it
pleadable in any action at C Law. in Replevin
supra? In wh case the ~~case~~ right to tender
in y action seems to follow from the right to tender
in discharge of the distress

ct of Com Pleas in Eng.

In C. B. y Def has been allowed after a rule upon the plff. to show cause vs it, to bring specific articles, for y conversion of wh Trover is brot into Ct. But y practice appears not to have prevailed. 5 Bac Tena P. Barney note, 220.

B R. have at any rate refused to adopt it.

Mode of Pleading Tender.

In pleading Tender, every requisite to its validity must be averred to have been complied with. Bac ab. Tena h Talk. 624.

Thus in plea of Tender or a readiness to pay wh is satn. at y day appointed in Plff's absence, Def must allege the Tender. Sc at y uttermost convenient time of y day 1E "for y space of an hour next before and untill y setting of y Sun" Cro P. 423. Sir 777. 833. La Ray 338. 12 Mod 531. Talk 623.4.

See in 1. Little's Entries. 164. for form. for y space of an hour next before, and untill y setting sun, he was ready. I ym and there offered be. Esp. D 160. 299 5 Co 114

So "that y Def was ready to pay" is not sufficient - he must plead an actual offer. Noy. 74. 3 Lev 104 Bac Ab. Tena. H. 1. 2 Lev 209 Esp D 157. 298.

But this rule supposes y creditor to have been present or at least. yt y contrary does not appear Talk in the plea, for if y debtor is at y time and place. 622.3. to pay or perform. and y creditor is absent. a formal Tender. is not then necessary. Ergo alleging readiness of Plff's absence is sufficient, as far as far as regards y act to be done. 1 Selw 173.4. Sir 458. Doug 661. Case 203.

So when at y time appointed y original creditor was dead, & no Ex^r was then appointed, allegation of readiness is sufficient, but the def shd plead yt he is still ready. 2 Show 143. 5 Bac. Abr. 16. L.

So if y creditor being present waives, the Tender, readiness is sufficient as by an Express decl^r of y creditor yt he will not receive it.

Doug 662. 1 Selw 172. 4 Roll 453 1 Roll 453.

And if it do not appear in the Plea yt y creditor was absent, a refusal by him to accept, must also be averred; for the offer by him ^{Def} might instantly have been retracted. (tho' y omission of this allegation is cured by verdict) The creditor is always deemed present, in the contrary appears in the Plea. Ld Ray 687. 904. Cro C. 889. 2b D. 160. or 229. Talk 623. 2 Saund 352. 1 Silver 13. 2. Lev. 23.

And if A is bound to deliver a Specific article to B. for a given price on request and B sues on the contract alleging the request and that he was ready to receive and pay. y allegation is sufficient without averring tender of y price.

When Tender and Refusal discharges the debt or duty y Plea shd conclude with praying Judgment of y action for in such case the action is barred forever. Talk 623.

Cart 143- Ld Ray 254. Co Litt 207. 9. Co 79.

But where y debt &c is not discharged by the Tender y plea shd pray Judgment of the damages only for y Plea with y Proffert of y money admits y debt to y amount tendered.

But as damages only are recovered in ass^t. Judgment

The damages and y Prayer in this action. The prayer
shd be.

The General Issue and Tender cannot both be pleaded,
to the whole or to one, and the same part of y demand,
For the Plea of Tender admits an Existing debt to y
amount of the sum tendered and the Gen Issue denies
it.

5 Bac 16. Barnes Notes 281.

But the true reason seems to be y^t these two
wd require different results as to y Indagmt to
be rendered, as the former goes in Bar of y action
y latter in discharge of the costs merely.

But they may be pleaded to different counts.

Where y duty is paymt of money, pleading Tender and
Refusal, is not in General sufficient. But where y
Tender don't discharge the duty, y obligation being to
pay money, y Def must allege in addition to Tender & Refusal
either "Tout temps" Co Litt 207. Cro E 705
y^t he was always ready, or that he is still ready.
i.e. since y Tender, as the case may require and
also a Profert "in curia" of y sum tendered.

5 Bac 16. to 19. h.

Rule as to the averment of Readiness

If y contract was to pay immediately on demand, y Def must plead Tender, and Refusal, that he was
always ready, i.e. from the time of y contract or creation of y duty, to pay, and is still ready. For readiness
since y Tender, only, is consistent with y previous demand, and refusal. As Indeb. A^{pt} for y money
is payable, when the promise is raised.

Le Ray

254.

Bac ab

Pen H.C.

Call 2 622.

Curia

413.

12 Mod 152. 8 Call 5

Call 623.

20 Litt 207.

168.

It is not necessary in the plea of Tender on Indeb.
 Apt. for the Def to traverse or answer a Special
 Request. laid in the declar on a day Subsequent to y
 promise stated. Such Request alledged in the declar
 is Surplusage, there being no need of an actual Request
 in Pleading. Hob 207. 5 Bac 13. Tender. G. or h.

And the plff in such cases may reply a demand
 and Refusal between the time of y contract and the
 Tender: for after a refusal he want bound to accept
 a Tender, like y case of Tender after y time appointed
 for paymt. or he may reply a demand and refusal
 subsequent to the Tender.

But if y money was payable at a particular time, tis
 sufficient to plead after alledging tender and Refusal
 yt he is still ready. De. for he wasnt bound to pay
 or be ready or before that time

In this case the Plff may reply a demand and Refusal
 subsequent to the Tender. as in the former case.

Pleading in case of cumbrous articles

But when the contract is to deliver cumbrous articles,
 tis sufficient to plead "Tender and refusal only with
 alledging subsequent readiness or intent. It wd be unreasonable
 yt the debtor shd be obliged to hold ym in readiness,
 or bring them into Ct. The Tender itself is a perpetual
 bar. 18. the debt is discharged.

9 Co 79. Co Litt 207. 2 Roll 524. Bac Tender

Found to be necessary in such case, tamen, to allege
 y^e thing cannot by reason of its weight be brot into
 Ct.

There is the Rule observed in practice? Besides y^e
 fact will in general and perhaps always appear
 from the description of the property and this wd seem
 clearly sufficient.

When tis necessary by the former Rule to plead "Tont temp^e
 or incore prist" y^e def must plead with a "Profest in euna"
 of the money. yt the Plt^f may still accept it, if he
 will, for the debt remains due and the Def must
 hold himself ready to pay. See 638. 2d ed. Abr. Tender 4
 4. 12 Mod 354

The Plea an't good ni brot into Ct. If not brot in,
 y^e Plt^f may sign Judgmt for want of a Plea.
 2d Ray 83. 354. 649.

It is laid down that if an action is ^{not} on a Penal bond,
 and tender pleaded with an "incore Prist" and
 profest of y^e money, and Plt^f traverses the Tender, and
 the Issue is found vs him, y^e Def shall have y^e money
 back, and the Plt^f's debt is lost forever. Co Litt 207
 Falk 593. 2d ed. Tena. 3.

The reason according to Bacon, y^e yt the Plt^f has
 made his refusal, matter of Record But y^e true
 reason seems to be, yt the Plt^f ought to suffer
 for attempting to subject the Def to y^e Penalty, by false
 pleading.

The reason of the last rule has ceased, since Penalties
 are chanced at Law, and the rule now is, yt the
 Plt^f in such case, is entitl'd to y^e money brot into
 Ct. 1 Taun 33. n. 2 TR 645. 123. F 332.
 8 Mas. 201.

On a contract for y delivery of cumbrous articles, if a legal Tender is made and refused, some hold that y property ~~vested~~ tendered vests absolutely in y creditor, y debt being discharged. See *infra*

But tis impossible, y property shd thus rest in y creditor vs his own refusal to accept.

infra

Others hold the creditor by his refusal, forfeits both his debt and all claims to y property tendered, Ch. Pl. 127. *Infra*

But this last doctrine appears too strong in perhaps under the old Rule, when the Tender was made in pursuance of a Penal bond, a rule not appears now not to be Law.

Shipman's Essays 127. 200.

See *Infra*

Swift Dig. 234. in y subject

Others hold that the debtor must keep the property for the creditor. The authorities are contradictory

In Principles I think, y consequences may be stated thus. *see infra*

If y creditor refuses the property tendered, or is absent at the time or from the place appointed, y debtor may leave the property to its fate at y place. The debt is discharged or on no principles is he obliged by the creditors default, to become liable of the property. He can't come to plead with an "Innocent Priest"

Wrong.

If y creditor refuses the property tendered, or is absent at the time or from the place appointed, y Debtor may leave the Property to its fate at y place, or constitute himself the mere keeper of it, or waive the Tender and use the property as his own in which last case he shd be liable on his obligation

I think y debtor may leave y property as above, for he has done by the Tender all that the Law requires of him. The debt is discharged and on no principle is he obliged by the creditors default to become bailee of the property. He is not bound to plead with an "uncere Poist" or "out tempore"

Co Lilo 207. a.

If y property is thus left, y creditor may make it his own, when he pleases, by taking it, being then abandoned by the Debtor. It is in effect a continued Tender of it, and even a wrongful taking by a Stranger, can't oust the creditors right to take it. But the debt is discharged.

II.

If y debtor keeps y property merely to preserve it, it wd be equitable for him, to deliver it upon a subsequent demand, by the creditor. But still I think y creditor cd not maintain trover, if y demand were refused, because his own prior refusal to receive it, has prevented the property from vesting in himself.

But wd the debtors refusal operate as a waiver of the original Tender, and thus leave him liable on his contract. I'm inclined to think, it wd not for what form of rep^{ty} to the Plea of Tender, cd subject him on the contract? He ant bound to plead with an "uncere Poist"

But if y creditor has failed in an action on

y contract, upon the plea of Tender, & afterwards demands y property, he may I think, on the debtors refusal maintain Trover, y loss of the debt being Equivalent to paying for the property & the Indgmt vesting the Title to it in the creditor. It wd be analogous to y effect of a recovery of a piece of goods sold and then refused by the vendor.

III If on y creditors refusal of y Tender, y debtor waives it, as by expressly retracting it or by agreeing to rescind it, he must remain liable & conclude on y contract, and if he shd plead y Tender, y Plff I presume, might traverse it as being rescinded by mutual consent at y time it was made.

If taken y debtor, instead of thus waiving y Tender at the time, shd afterwards convert the property to his own use, as by consuming or selling it, I dont perceive how, y creditor cd for y cause recover on the contract; for he cdnt successfully traverse the Tender, and the debtor ant bound to plead, "uncore Poss" and wasnt bound to hold y property ready for the creditor.

The creditor taken might sue upon the covenant and if defeated by the Plea of Tender, might then demand the property or on the debtors refusal to deliver it, maintain the action of Trover. I suppose as the Indgmt I think vest the right to y property, in the creditor as in the 2^d clasp.

XIV. Set off is not at C Law, a defence to this or any other action. So that at C Law. if the Plff owed the def. a distinct debt, equal in amt to that due the Plff. & Def was driven to a Seperate action to enforce it. 1. Selw. 164. Esp D. 238. or 75.
88

In some cases taken y Def might obtain a Setoff by a Bill in Chy. as case of Involvement of one of the parties. 3 Bl 304. 4 TR. 143.
Cousp 56. 6 TR 466. 1 TC BB 657. 2. Do 40.

But now by St 2. Geo. ^{2d} 3^d Ch. 22. made perpetual by 8 Geo ^{2d} 3^d Ch 24. mutual debts. tho of different natures or degrees. may be set off at Law. if both are due in the same right and if the debt claimed by the Def, was due to him at y time of the Suit brot. and generally not. Secus. Esp D. 239. 1 Selw. 164. 66. B. N P. 180.
1 East 375. 10. Do 418.

There is a Similar St in N Y. 1 Selw. 164. n. but not in Connt. It of N Y. Section 24. Ch 90-

The defence may be made under the general Issue, on notice given, in where the debt sued for. be to be Setoff. is created by Penalty. 1 Selw. 164. 168.

A sepearte debt vs one person. cannot be setoff vs a St debt due to 2 persons. A and B owing C. and C owing A. there can be a no Setoff. for they are not in the same right and vice versa. C. owing A and B. and A owing C. there is no. setoff.

For Setoff see. 1 Selw. 164.

But debts to be set off. must be liquidated or certain.
 As a Bond sum certain due by bond, Covenant, or
 Express Covenant, contract, or for a loan of money, for
 goods sold, labour done. &c. Cowp 57. 5 PR 488.
 Esp D. 238.

The same certainty in debts to wh Tender is good
 defence. 18. the amt. shd be ascertained by mere com-
 -putation. Cowp 56. 5 PR 488. 2 Burr 1024
 1 BB B 394. 2 Cranet. 344. 2 John R. 150.

4 Esp 207

It is no plea, where either of y sums is to be
 ascertained by mere Exercise of Judgmt or discretion.
 As in damages for not repairing or for not performing
 certain service, for injuries by Newspaps. negligence
 &c. Ibid 2 John 150.

The debt to be set off. must be a subsisting debt at
 y time of the Suit brot. & one not nd support a Suit.
 Ergo to a Plea of Setoff. y St of Limitations is a good
 replication or a good objection to the Setoff under
 the General Issue. Str 1271. 1 Selw 168.
 Esp D. 239. Lawes on pleading 157.

So money paid voluntarily, as by mistake, cannot
 be set off. It must be an absolute debt. - not one
 created by fiction of Law. Esp R. 83. Esp D. 239.
 3 East 12.

Both debts it is said, must be due in the same
 right. This is not universally true tamen. See Infus
 case of an Act. 1 Selw 107. Esp D 239.

Hence a debt due from a partner can't be set off
 vs a Debt. due to y firm. Esp.

Nor any debt vs a ^{separate} General one, or e converso
Is within y St. 1. Selw. 167.

Nor a debt due to Def in right of his wife vs one
due from himself personally. But N.P. 179 Ek D 139

But a debt due to one as surviving partner
may be set off vs a debt due from him in his
own individual capacity and e converso, for the whole
legal debt is vested in him and the whole legal
duty is devolved on him in this case.

1 Selw 167.

5 TR 493. 6 Do. 582. Ek D. 240.

So a debt due to one of y parties as Ex^r or adm^r
may be set off vs a debt due from him personally
p^re converso" 4 #.

Ek D 240.

Miles 204.

This is by an Express provision of y St. #.

But N.P. 170.

1 Selw 167. Ek D 241. Contra

1 Selw 167. wrong

(Ek D 240

A debt due by Indgmt may be set off. vs one 3 Mils 396.

due by Specialty or Simple contract. 2 Burr 1129. 3 TR

For y mode of Pleading a Set off. vide Selw. 167. 69

3 Ch Pl.

XV. Foreign Attachment.

Foreign Attachment is a defence in this action 12. if a
demand has been recovered of the Def. by foreign
attachment. first by the creditor of the Plt. This defence
whenever it prevails in this country, is founded on St Law.

In Court y defence may be by St given in Civ
under the general Issue. So at C Law. It is in the
action of ass^t.

By Comt. It foreign attachment lies ^{only} to an absconding Debtor, one who has fled the State or concealed himself.

It is a good answer to the Plea, y^t y debt for wh^{ch} y action was brot was assigned to another, before the service of Foreign attachment.

This Process under a Comt. Law, is an attachment to the absconding the Debtor, y debt in the Principal action, wh is served ^{vs} in his debtor y present Deb. in copy left with him, as debtor Agent. & the party absconding and the debtor is here called Garnish.

For defence of Award and Arbitramt see Award.
For Defence of Usury, see Usury. As to Fraud, Surety, & Illegality, "contracts" see.

A few words about Usury -
Usury is the taking of or contracting for illegal interest, for forbearance of y principal of a Loan - Contracting for, is y reservation of Interest Ord. 1.

Interest is y premium wh y borrower, or Debtor pays for y thing lent - or tis a premium wh a debtor pays for y forbearance of a debt.

Taking an exorbitant interest for any chattel is Usury - 3 Wils 395. 1 Alk 357. 3 T.R. 531
2 S. 2 238. Comp 114. 770. see Eng &c. Ord 1. 21.
appx 5.

But this can only be, in when received on a Substitute for money, or in it is a mere disfigure.
Suppose a wheelbarrow is lent one day for

50 doll. here this is no many - of no brand -

Action of assumpsit 242
 Ist Indebitatus assumpsit for money
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Definition of Slander.

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"Com" stands for "Com" a person
Slander consists in maliciously defaming in his
reputation. I By words spoken or written which tend
to injure him in any point of Personal Security,
Office, ^{Profⁿ} profession or interest. 4 Bac 483.
4 Co 14. Bal 9. 3 Com 123. Ep L. 490.

II By ^{what} words, or by figures, pictures or emblems,
of the above tendency. Ep L 490. 3 Co 120 5 Co 125.0.
It is committed *habeat y* usual division in 3
ways. 1. By words spoken. 2^d by writing 3. By
signs, pictures &c

Slander by words is of 2 kinds. 1st by words
in themselves actionable, 2^d by words not in
themselves actionable, but by some special
damage sustained in consequence of them, becoming
actionable. 4 Bac 483, 494.

The Rules relative to oral Slander apply in
general to written, but not universally. 4 Co 14.
They are to be taken as applying to both
kinds, in where y contrary is stated. Post.

I of Oral Slander.

2

To render words slanderous in Law, falsity and malice
must concur: according to the very definition, malice
in Law, means not necessarily Personal illwill
or malevolence, but any wicked or immoral motive:
as if from ill will to A, one should maliciously
defame B. (as wife, child or Parent) y words
wd be maliciously spoken of B.

Is a General rule, that for words in themselves
actionable, Plt^y may recover on merely proving

y words. some exceptions (about 18.21.) for damage is implied and such words "prima facie" import malice. But this presumption of malice may be rebutted in some cases by proving they were spoken under circumstances wh exclude y inference of malice. 4 Bac 183. Bul 6. 15 R. 111. # arg. and asserted by La Mansfield # Post. According to this classification words may be actionable "per se" tho they dont injure ones reputation i.e. moral character and they may injure his reputation and yet not be actionable.

Classes of actionable words. First. Those wh bring the person of those of whom they are spoken into danger of Legal Punishment. Finch Law 185. 2^d Tending to exclude him from Society. 3^d Injuring one in trade or profession. 4th Tending to injure one in his office. 3 BB 123. Finch Law 185.6. 4 Bac 483.93.

Under bringing into danger of Punishment. If the false words charge a fact wh wd incur corporal punishment. y words are clearly actionable as charging Treason. Perjury. &c 4 Bac 483. 4 Co 15. Cro E. 602. 609. 38. 1 Roll 63. 5. 6. 49. 77. 1 Mills 177. 186. 4 Co 80. Cro J. 114. 1 Mills 177.

.3.
Charging crimes. Words charging wh wd subject to transportation are actionable 4 Bac 486. Pi 40. 1 Roll 36.

Words charging what wd subject to imprisonment are actionable, imprisonment being corporal punishment. 1 Com 179. 1 Roll 466. 15. 38. Salk 694. 2 Bents 266. 4 Bac 486.7. Com. 137. Cro E. 315. Finch 185. 1 F. 40. (Salk 696 contra) denied 4 Bac 487.

3. Mil. 186. (The 90 18. Elvi mentioned in Talk 686.
subjects to imprisonment, if the bastard is chargeable
to the Parish. Post

In Count. holden by the Sup^t. yt words charging
what wd. subject to a Fine, are actionable
or not. as y^e fact charged is infamous or not.
There is there any such rule in Eng. The books
are Explicit on this point, tho y^e cases below
seem to countenance this distinction. As to
charge one with keeping a lewd house, is
according to this distinction, actionable, being
infamous and finable. 4 Com Bl. 168. 4 Bac
487. 8 pl 50. 5. 60. Ex. 2^d charging a finable
offence vs Positive Law. Eob 4. 487. says that to
charge one with a crime wh makes the person
spoken of. liable to a prosecution, is actionable.
he cites Finch 186. 4 Bac 487. Pl 60. Is not this
too general? Suppose the case of mere Trespas
charged, wh is indictable, wd y^e be actionable?
4 Bac 480. Pl 27. Sid 164. Cro J. 39. 4 Bac 487. 50.
Is there any any Eng case in wh words have
been ~~as~~ holden actionable under y^e offen head,
in y^e offences charged might be punished
corporally?

Words charging what wd. subject to punishment
must be actionable, tending to charge a criminal
act, committed, charging evil intentions, not vatu.
1 Sid 573. Rolle 54. 23. 1 Com. 191. Eob 4. 490.

As "he gave J^y counsel to kill me". Is are
not actionable. 4 Co. 1. b. 6. So I expect to see
him Indicted for Treason, are not actionable.
Finch 18.

So "he is in Goal for Stealing a horse" not

satis. Plutt 2. Esp D. 497. Quere for words of similar import are holden satis post verdict. 2 Mils 360. Are not y words actionable on Demurrer? No.

Adjective words under y^e head are actionable or not, as they presuppose an act committed or not. As Seditious. Treacherous. &c not satis. Perjured is satis. for how cd he be perjured with having committed Perjury. Esp 497. 4 Co 18. b. 19. a.

He is "foresworn" non actionable, ni it be added "in a Judicial proceeding" or "in such a Ct." 4 Bac 484. 4 Co 15. Cro E. 609. 3 Lev 166. See Comt R. 40. where a charge of Perjury in a meeting of Church members. was adjudged actionable!!! Quod Mirum. It is so all principle.

To call one a "Thief" after a general pardon, is actionable. The pardon clears from guilt. So if the particular Thief had been pardoned. Esp D 497. Hob. 81. 4 Bac 487. pg 52. 3 Bac 116. Ray 23. Suppose y words to be, "he stole" Wd these words subject the Speaker? They are true.

To falsely charging one with a crime of wch he has been acquitted. 4 Bac 487. Pl 52. Owen 150. There is no danger of punishment in fact. But tis satis that y crime charged was one wch exposed to punishment. I.E. of such a nature as to expose.

- o. If y words charge a crime wch it appears cd not have been committed, they are ^{not} actionable as he has killed J.G. he being still alive. Esp D. 496. 4 Co 16. a. But 5. or "he has killed me"

But this matter must be pleaded in Evi, it cannot be given in Evi, or in mitigation of damages. Bull N B. 3.

If the words charging a crime, a description not corresponding with the crime charged be added, the words are actionable. As calling one a thief, because he has committed an act, which amounts only to Trespass, as "he stole my growing timber" 4 Bac 570. 80. Pl 27. 8. Sid 104. B. 4 Co B. 4. 2 a. 1 Role 57. Cro J. 573. Evi D. 571. 7. Bull 3. 2 N B. 330. Post 15.

But falsely charging a crime (tho the prosecution for it is barred by the Act of Limit. at the time of the words spoken) is actionable. The Act is never matter of defence to a prosecution, as proof of innocence, nor be. Besides this enough that the first charge is of such a nature as exposes the punishment. Comnt Inst Ct 1793. 1793

If the words in themselves actionable, admit of an innocent meaning, it lies on the part of the Def to show that they were used in that sense. Pea 4. n. Post 15.

When words claimed to be actionable, as imputing an act of fact punishable capitally, tis a rule that if the punishment of the act be charged in an alternative i. e. ^{corporally} capitally or not ^{capitally}kata circumstances, the words are actionable, if the circumstances are such as to require corporal punishment. Secus not. As charging one with being the father or mother of a bastard child, which has been chargeable, — for a putative father he is not liable to imprisonment, nor the child has been chargeable, 1 Bac 317. Cro C 315. Salk 694. 4 Bac 487.

Pl 57. 486.
Pe 42. 3. 4.
4 Co 17.

2^d Tending to exclude from society, as to charge one falsely (1 Lev 205.) with having a contagious disease. 10 B & 498. 3 Com 123. Cro J. 144. Role 44. 1 Rob 219. 2 Co 17. a. 2 Bac 408. 1 Com L. 184.

One word to be actionable under this head must charge a present disease, 2 St 1189. 2 JR 473. formerly Scus. Cro E. 214. Cro J. 430.

Under y^e head adjective words in the present tense are actionable. 12 Mod 248. 4 Bac 488. Cro J. 144. as he is Leprous. 1 E has it.

3^d Tending to injure one in his trade or profession. As falsely calling a Lawyer a knave is actionable for want of integrity is a disqualification for his profession. 4 Bac 490. 1 Com L. 182. 10 B & 498. 3 Bb 192. Finch. 186. 1 Role 52. 635. a. 53. b. 5. 15. 52. 4. 2 Ventris 28.

To "he has revealed his clients secrets" of a Lawyer is actionable. 1 Role 57. 657. 1 Com. L. 182.

To "he is no more a Lawyer y^e n y devil"
1 Role 84. 3 Wils 59

To in general falsely charging a Lawyer with ignorance in his profession, for y same reason (ut Sub) Cro E. 278. 1 Lev 297. 1 Gil 327. 1 Role 54. 4 Bac 491. 2. 1 Com L. 182.

In these cases the Lawyer must state in his declaration, yt at y time of y words spoken, he was a practicing Lawyer. Aliter no injury is presumed. Str 321. 4 Bac 491. 2 Vent 28.

Popk 207. 4 JR. 366. Proff of Ffths acting as a Lawyer wth the record of his admission is satis. 4 JR. 366. 2 The Moley 487.

So falsely charging a trader a Bankrupt. is actionable.
 So "he is a Bankrupt now" So "he will be a
 Bankrupt in 2 days" for y later words. Tho
 in y future tense, tends to injure his credit.
 and therefore his profession or Trade. Credit being
 deemed essential to success in trade. 4 Co 19. a.
 2 Str 762. 10 D. 490. 1 Com D. 183. 4 Bac 493.
 Sel 299. Carth 330. 1 Roll 67.

So to charge him with cheating his customers,
 and advise others not to deal with him. It
 tends to injure him in his calling. 4 Bac 493.
 2d Ray. 1484. 3 Burr. 1688. 2 Lev 62

In actions of Tradesmen in these cases, it must (9)
 appear by laying "a colloquium" or show it must
 appear in y declaration y^t y words were ^{published} ~~pronounced~~
 with reference to his trade. 4 Bac 492. Talk 694.

Str 696. 1169. 5 Mod 305. Ray 61. 169. 2d Ray 1417.

As "he is a cheat" here "a colloquium" concerning
 his trade. I.e. an allegation y^t in a certain discourse,
 concerning Plffs trade or concerning him as a
 Trader.) is necessary to be laid. But if y words
 were, "he is a Bankrupt" it wd be satis. I
 suppose, merely to aver he was a Trader. The
 words imply a reference to one as a Trader.
 Tho "he is Insolvent wd not" For tho any
 man may be Insolvent, no one in a trader
 can be in strictness, a Bankrupt. under y
 Eng Bankrupt Law.

"Do not deal with him, he is a cheat, &c
 is good wthout "a colloquium" 1 Lev 105. 200.
 4 Bac. 492. 2 Lev. 62. Post 12.

Falsely calling a clergyman a Liar decided to
 be actionable. in Court Imp Ct. and Ct of Errors

it tends to injure him in his profession. *Bucher vs. Baehus*
Brooks.

Allen
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In Eng. to charge a clergyman falsely with
breaching his, is actionable. 3 Lev 17. 1 Com D 181.
1 Role 58. B. 36. So to call him a drunkard
is actionable. 4 Bac 490. (Cowp 253. Str 946.
to other points as calling him a Rogue. &c.

12. To call a physician a Quack is actionable. 1
Role. 54. 1 Com D. 182. To say he has killed a
Patient. said not to be actionable. 1 Cro E. 620.
in it. & be added "knowingly" "wilfully" or y like.
(Cinch J. contra) Where as it supposed ignorance
in his profession. 4 Bac 491. see 11 Mod 221.
were y same words said of an apothecary were
adjudged actionable 11 Mod 221.

To false words tending to injure a Mechanic
in his trade, are actionable 4 Bac 491.

4th Tending to injure one in his office. Charging
one in an office of profit with want of Integrity
or ability. is actionable, it tends to impair his
Livelihood. 4 Bac 488. Cro D. 500. 2. La Ray 1296.
Galk 600. 1 Com. D. 180. 1 Role 60.

But words charging a person in an office of
mere Trust or honour. (not profit) with want
of ability ^{are not actionable} or ~~moral~~ character. 4 Bac 488. Pl 93.
Galk. 895. Tenu if they impeach his integrity.
Galk 600. Str 617. 2 La Ray 1369. 4 Co 16. a.
Hob. 140.

beetleheaded.

To call a man "a beetle headed Justice" is
not actionable. it is not an office of profit
in Eng. Galk 600.

Charging a person (in either case) in office with inclinations & principles wh. disqualify him for office are satis. wth charging an act, 'as he intends to subvert y^e government. Bul. 3.

(11)

But where y^e words spoken as of themselves import to have been spoken with reference to Plffs official character. "a colloquium" is necessary to show y^e reference as in a certain discourse of and concerning y^e Plffs office. It shd be previously be stated what his office &c is.

Str 618. La Ray 1396. 4 Bac 489. pl 88. 1 Lev 280.
4 Bac 488. pl 74.

Secus if y^e words themselves import a reference to Plffs official character. as he is "a Marriot Justice" spoken of a Magistrate Cro. J. 557.
1 Lev 280.

So generally where y^e words are not actionable, ni as they refer ^{to} some collateral fact. (wh. constitutes the ground of y^e action) to wh^{ch} y^e words themselves do not upon y^e face of y^m, refer, "a Colloquium" is necessary. to show y^e reference to y^t fact. as to say of one who is a "Trader" "he is a Cheat" These words will not support an action wth "a Colloquium" laid to show y^e reference. as a certain discourse &c touching y^e Plffs trade. &c. 5 Mod. 308. 2 Saun 307. Eob. D. 501.
2 Str 1109 "ante 9"

(So generally where y^e words are not actionable, ni as they refer to some collateral fact) omit.

"A colloquium" is said in Eob. D. 514. to be necessary when a trader is called a Bankrupt. Quere (12)

y pltf being a trader, and this fact being alledged
 Cas y Rule supposes.) y words (I think) necessarily
 import a reference to his trade, as no one in
 a trader can be Bankrupt. No authority
 cited by Ek. (see 1 Lev 280.) where y words
 were "he is a forewarned Justice" and colloquium
 holden necessary. 1 Role. 52. Cro E. 270. 96.

4 Bac 575 pl 35.

To saying of a Tradesman, "don't deal with him,
 he's a cheat" "Colloquium" holden necessary. 2 Lev. 62.
 La Ray 1480. To he is a knave, and compounded
 his debt, "Colloquium" holden not necessary.

(I G however think it is) 4 Bac 513. pl 36. 515.
 Cro E. 240. Ek & 502. In all these cases however
 Pltf's trade, office &c must be alledged.

If the words themselves don't show their application
 by designating in Express terms the subject or
 person to whom they were applied, "an innuendo
 is necessary. As the meaning the Pltf &c" The
 office of an Innuendo is to explain y
 application of words to persons or subject matter.
 4 Co 17. B.

If a Rule y nothing (ie no words.) wh wh
 otherwise remain uncertain to y hearer can
 be reduced to certainty by an Innuendo. 4 Bac
 516. 4 Co 17. B. More accurately expressed thus,
 any thing wh taken in connexion with all
 that passed between y parties to y conversation
 remains uncertain to y hearer, cannot be made
 certain by an Innuendo. It can make certain
 only by a reference to something said or
 happening before, wh is certain. As a certain
 person (meaning the Pltf) killed his neighbour

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(meaning I P) there being no other words spoken to identify the person meant: the Innuendo is bad. Aliter if in a discourse concerning the Pllf. & Def had said: "he has killed his neighbour." here the innuendo meaning of Pllf wd be good. 4 Co 17. B. 1 Role 873. Coups 684.

13.
An Innuendo ergo can never extend of meaning of words beyond the proper import as I burnt my barn. (meaning a barn full of corn) innuendo not good, if no other fact or circumstance appears to make it so. But if it had been averred yt Pllf had a barn full of corn, and yt in a discourse about the barn, the Def spoke of those words, the innuendo wd be good. Coups 275. 684. Esp D. 511. 4 Co 20. a Cro E. 834.

So "he stole half acre of my corn" innuendo of corn wh grew on a half acre, tho it was reaped." The innuendo is bad, for tis inconsistent with y words. Cro E. 428. 1 Role 82. pl 1. Coups 684.

Where an innuendo is unnecessary a bad one is Surplusage as "he was perjured" innuendo in a certain bill exhibited in a certain Court. The Innuendo is bad, but the declaration is good wthout it. So "he has forsworn himself" (innuendo) in such a Ct." y innuendo is impertinent, y words spoken cannot bear such a meaning. 4 Bac 576. 1 Role 83. Cro E. 609. Tho y declaration is good wthout them.

So if a person is uncertain from all y words spoken, an Innuendo cannot make it certain. As "one of the Servants of B. is a thief" innuendo y Plff. innuendo not good. So "one of you is perjured. (Innuendo) y Plff. y innuendo bad. Est 571. 4 Co 17 B. 1 Sid 52. Cro E. 477. Hob 245. 1 Roll 87. 4 Bac 574. pl 38.

(14)

It has been holden yt where an action is brought for words tending to injure in trade profession. office. it must appear in y dect by Express avermt. or in Express words that y Plff was at y time of y words spoken. of such a trade. De Est Dig 515. Luttt 40. That Plff has been a Merchant, Trader &c. "for many yrs past" not sufficient.

Seemle from Cro E. 794. in wh case there was no Inagmt. Cro E 265. Contra 4 Bac 513. Cro E 273. Yelv 159. Cro E 222. Cro Ch 282. 1 Sid 425. and that he shall be presumed from the avermt. to have been a trader at y time. The weight of authority seems to be on this side of the question. But y words don't import that strict certainty usually required in the Language. of Pleading.

is not
his whole
living.

So in y case of a Trader. y avermt. "yt he gains his living by buying and selling" is necessary. Est D. 345. 1 Sid 292.

Words of heat and passion are said not to be actionable. Est D 520. 1 Lev 49. 4 Bac 522. 3 Bb Corn. 185. On this subject tis a Rule, when they import no definite charge, they are not actionable. as rage. rascal. villain &c. So perhaps when wantonly provoked by

Plf. Secus. if Def in parascism of unprovoked
anger utters actionable words. 2 N.P. 230. Post 19

actions of slander were anciently rare, words 15
were then taken in melior sensu, post frequent
when taken in feriore sensu.

now they
are neither

The words rules of construing words, 'in mixture in y'
sensu' are now abolished. They are to be taken 'mixture
in that sense, in wh they wd naturally be or servie
understood by the hearers. Cb & 511. 4 Bac' sensu"
497. Coub 270. 688. 4 Bac 510. Bul 4. 10. Mod
198. Plib 12. Pea 4. n. 2 Mod 159. 3 Felw. A.P.
1064. 5 East 463.

When words in themselves actionable admit
of an innocent meaning, it lies on the def.
to show they were used in that sense.

Pea R 4. 1 Vern 407. 2 A.B. 330. 1 Polm 297. 275.
3 Do 180. The hearer in such cases is enquired
of. how he understood ym (semble) out of
ironical and so understood.

Slandorous words in a foreign language, are
actionable, if understood by any of y hearers.

Secus not. 4 Bac 408. 1 Rolle 74. Cro E. 886.
LCob. 126. Cro C. 865.

All y sentence or language used by Def, at y
time, in immediate connexion with y words
complained of. is to be taken together. Cb & 511.
for the subsequent words may explain y former.
so as to fall short of Slander, as in case
of a description added added. Cut Sub ante 6.
Moscite a Locut" 4 Co 19. a Bull 4. 2 Mod 159.

10.

Courts will not do violence to language, to find an innocent meaning w^{ch} "your husband died of a wound you gave him" says tho^t y wound may have been by accident. E & D. 512. Bull 4. J. R. 243. So, a forced construction will not be given to make words actionable, wh have innocent meaning. As "he is a common maintainer of Suits" spoken of a Lawyer. for tis his professional business. to conduct Suits. E & D. 512. Hob 117.

It is a General Rule that words must, to be actionable, import a direct charge of a slanderous nature. not by inference. As J. got his Manor by swearing & for swearing" not actionable for 1st the charge is too General, and they don't import any charge upon J. E & D. 512. 4 Co 15. a.

Yet when y intend to charge a crime (or any thing else.) of wh y charge is actionable, tho^t somewhat indirect as I will make you, an Example for a perjured Knave." E & D. 512. Bull 4. 1 Com D. 185. 1 Role 49. & 45. Yelv. 160.

17.

So B'll prove he ^{poisoned} J. J. "1 Com D 185. 1 Role 50. Cro E 569. 1 Sid 381. Went 276.

So "when will you return the ship you have ^{stolen}" This is actionable 12 Co 134. 1 Com D. 185. 1 Role 48. 2 Role 165.

So generally, actionable words imply malice 18.
 "innua facie" The presumption may by circumstance
 be rebutted as in case of a confidential communication,
 wh excludes the possibility of malice as the
 character of a servant given by a former master
 or mistress, on reasonable enquiry, this false.
 (If not proved true) malice must be proved.
 Information on such points is useful and
 important and ought not to be restrained.

In such cases also, y facts communicated are
 presumed to be of a private nature and probably
 confined to safe knowledge so that it would
 be difficult to justify, if they were true. 4
 Burr. 2422. 1 T.R. 110. Bul 8. Cro E. 91. 4 Co. 9.
 Esp D. 512. 502. 3. 5 Co 110 & n. 3 B et P. 587
 ante 2. Esp R 110. N.B. Bul N.P. 8.

So when one confidently and by way of warning
 said to another of a Trader. "he will be a
 Bankrupt soon" y words were held not
 actionable. This special damages were
 stated. Esp D. 513. Bul 8. 3 T.R. 60. 1. arg.
 503.

The retailing of slander fabricated by another
 is generally actionable. Esp. D 519. Bul 10.

Secus. if he truly name his author. at y
 time 12 Co. 133. 4. Cro E. 400. 3 Bulo. 225.
 7 T.R. 17. 2 East 426.

19.

But circumstances are certainly to be regarded
 in such cases, as to y intent as when in
 y spirit of concern. said "I have heard that
 J.P. was tried for Stealing" &c action lay not.
 1 Lev 182. 4 Co 14. Bul 9. 10. 4 Bac 198. pl 28.
 498.

Def's suspicion however is no Justification, tho' it may assist in alleviating presumed malice. Ep D. 518. Cro E. 38.

Words uttered by provoking or provoking questions, by Plff himself are not actionable, as "Dare you say I'm beguired?" answers her. if you will have it. 4 Bac 498. pl 29. Cro E. 297. ante 14.

21. The truth of y words is always a complete Justification, for words to be slanderous must be false. 4 Bac 516. 1 Roll 87. Bul 8.9. cited contra" not Law. Rule 42.8.7

So sometimes the Def may justify, tho' y words are in themselves actionable and false, or rather false, and of an actionable kind, as where false words are published in a Ct of Justice. In a declaration or count, or in articles of peace, see 3 Ep 32. for words in giving charge of another to an officer, on a complaint for a crime. Seem it wd be dangerous to prefer complaints, to Cts of Justice 4 Bac 499. 518. 1 Corn D. 104. Ep D 518. 4 Co 14. Cro E 230. 248. Hob 82. Plute 113. 1 Roll 43. 3 Lev 138. 163. Dyer 285.

But it has been holden that if Plff charges crime, not cognizable by the Jurisdiction to wh he applies, this action lies, & herein, he is not justified. Ep D 503. 4 Co 14. Case of Witness Cro E. F. C. 230. 248. Hob. 206. 267. 1 Roll 34. Corn D. 34. Led Quere. 1 T Cow B. 1 C. 53. 55.

1 Saund 132. n. 1. Cro E. 432. 1 Ep 109. is contra. The Rule seems not to be Law. "Malis Prosecutio"

So persons charged in articles of complaint,
 (tho' they were exhibited under oath) may justify
 saying the complainant has sworn falsely,
 for this is in his defence in a cause of Justice
 4 Bac 490. 516. 1 Roll 87. 2 Bac 138. 163.
 1 Roll 87.

Words used in a complaint to a grand Jury,
 or proper magistrate or in an Indictment are
 not actionable. Secus no one can safely
 complain of an offence. 1 Bac 490. Cro E 147.
 3 Leon. 138. 4 Es 14. Hob 82. 3 Esp R. 32.

So of words used in a petition to the Legislature,
 for a redress of grievance. delivered to the
 members only. 1 Laund 131. 2 Bur or ~~Roe~~ 810. 11.
 5 Esp. R. 110. n.

Words used by way of defence by a person accused,
 before a Church ^{disciplinary} pastor are not actionable—
 5 Esp R. 110. n. 1 Bur 178.

So of words used in pronouncing the sentence
 of a Court Martial that charges were false,
 malicious, groundless. no Libel. 2 NR 341.

Tho' if one falsely and maliciously and with
 probable cause, exhibit a complaint &c in
 an action for malicious prosecution will lie,
 but an action of slander ⁿ 4 Bac 500. "Mal Prot. n"
 will not.

So in general in y above cases of complaint or
 prosecution, if the course of justice is made a mere
 cloak for malice, a malicious prosecution lies.

"But not vs Grand Jurors" Sem⁴ Bac 500.
 3 Bl 126. Finch Law 385 305. Str 116. 1. JR. 508.

So scandalous words spoken ^{by} of a witness in Ct. are generally not actionable. 4 Bac 499. 518. Cro E. 230. 2 Buls. 269. Hutt 11. Secus if he go beyond the Issue and slander a 3^d person. Ck D. 504. 4 Co 14. Suppose he slanders a Party. is there no remedy?

Note A party to a suit may say yt a witness is perjured. by way of objection to his admission. 1 Com 194. 1 Roll 33. 1 Taun. 132. n. 1. 3 Leon. 138. 63. 1 Roll 87.) So if one witness in testifying charges another with having testified falsely. no action lies. It is only supporting his own Testimony or a mode of asserting it to be true. Ck D. 506. 18. 1 Taun. 131. 4 Bac 518. Bun 807. 1 Com D. 194. 2 Buls. 269. Hutt 11. Cro E. 230. 5 Ck R. 110. n.

24. So that y words charged were spoken by Def, as counsel in a cause, is in some cases a good defence, or Justification - in some not so - 4 Bac. 498. 518. Bul 10. Cro J. 91. 5 Ck R. 110. n.

Rule Where the words (tho false &c) are pertinent to y cause. (and suggested by his client) he is not liable. Ck D. 517. 1 Com D. 194. 4 Bac 498. 518. Cro J. 90. 3 Com. 29. But if y words are impertinent (tho suggested by the Client) y action lies. 3 Bl 29. Cro J. 90. 1

So as it seems implied in 3 Bl 29. if y words, tho pertinent, are scandalous and not suggested by the Plff. counsel is liable. Most of the books however make no difference between those suggested by the Client and

NP.
I not suggested. Bul 10. Esp & 57. 1 Roll 87. L. 20.
1 Com & 174. 1 Roll 33. L. 20. Does y^e circumstances
affect y^e reason of y^e case. when by the substitution
they are impertinent.?

It has been decided that for y^e purpose of
mitigating damages in favour of a client, an
advocate may use slanderous words. not
persistent. by 4 Bac. 498. 1 Roll 328. 1 Roll 37.
110. 2. n.

Still,
In a subsequent case For 462. 4 Bac 489. 25
holden that an advocate is never liable for
slanderous words in defence of his client's
cause. It is his duty - it is presumed he
was influenced by his Client. "But the
written don't maintain the 2 last cases.)
Where is the Rule founded in principle?

-Pleadings in this action-

In declaring his word to state, "falsely and maliciously"
but it has been holden that y^e omission of "maliciously"
was not fatal. after verdict. Led Sure. 1 Com & 96. 7. 35
1 Saund 242. a. 2 Bac 512. pl 8. 1 Roll 273. Twen 57. 3. 8.
"Maliciously" it is said is not necessary, if y^e 2. 5. 6.
words themselves are actionable, for malice
is "prima facie" implied. i.e. such words if false
prove or imply "prima facie" implied. i.e. such
words if false, prove or imply "prima facie"
at least the y^e fact of malice. But shd
not the fact itself be alleged (as in
murder)? For the words do not necessarily
imply it as a pedant does Livery, &c.

Sergeant Williams seems to consider
the Rule as Law. 1 Saund 242. a. n. Led Sure
Still.

A direct averment, that y words were false, is not necessary. falsely publishing sufficient. Ep & 516. Bull 8. The declaration usually states yt the Plf is of good fame. De. 1 Com 2. 120. not necessary.

Com 2. action in, Case in m. 11

Alleging yt y words were spoken openly and publick sufficient. ~~Ep & 516. Bull 8.~~ without saying in y hearing De. So in the presence of other persons is sufficient. 4 Jac 512. Cro Eliz 465. 485. 861. Moy. 75. 57

When there are 2 counts, one alleging actionable words, y other words not actionable & on a plea to the Plea, to the whole entire damages are given. Indagmt will be arrested. & a venire de novo awarded. 8 T R 564.

See if y words are Fil, in one count. 10 Co 131 3 Mils 177. Cro E 330. 788. Str 1094. 1 T R 308. 333.

12. said to have been spoken at one time. 1. T R 332. Bul 8. 2 Jac 1. Root 346. 433. The first of these rules has been repealed in Enmt.

In actions for words not in themselves actionable, special damages must be stated, this is the gist, and without proving this, no recovery can be had. At saying of the ^{former} he is Involent. Ep & 520. 8 T R. 138. Bul 6.7.

So where words are actionable, y Plf may state and prove special damages, but in this case he can prove no other damage yⁿ what is stated specially. Bul 7. Ep & 520. 8. T R. 132. 1 Role 58. That amounts to an allegation of special damages. see Str 666. 8 T R. 138. Bul 7. Feb 6. 290. 1 Role 36. Sid 326. vent 4. Cro J. 429.

But when y words ant in themselves actionable, holden that Special damages might be proved under a General Averment of damage. Str 666. 1 Com D. 198. Quere by Bac or Br. & Bul 7. Hest 290. Cb D 520. Not Law Semble.

Special
Damage.

The true rule appears to be that no Special damages can be proved in any case ni Specially laid.

It is immaterial what y false words are, if they are malicious and occasion special damage, as calling a single woman incontinent by wh she loses a match. Saying of a Servant "he is dishonest, unfaithful & incompetent" or that a Lawyer is Insolvent. 4 Bac 496. 4 Co 17.

In case of slandering a title, as tis called, a calling an heir apparent a Bastard, tis satis to show remote or probable damage. Cb D. 501. 4 Co 17. Cro D. 213. 4 Bac 494. 1 Role 38. As Plt's father or ancestor signified a design to disinherit. Satis also to show the words tends to disinherit. 4 Co 17. Cb. 501.

To descend in favour of youngest son, tho' not heir apparent. But no action wth if Def claims to be next of kin The words are then only an assertion of his own claim. Ibid.

The general Issue is a denial, either that Def spoke y words, or yt they are not actionable for want of malice, as in y case of confidential communications (Lub) 1 T. 2 110. Bul 8. Cb D. 503. 17. 1 Lev. 82. 15. either or both these facts may be denied under this Issue.

In Court, the general Issue includes all defence, even that y words were true or otherwise inadmissible, in such as arise from some act of the Plt^f amounting to a discharge. But by rules of the Sub Ct, notice of Justification must be given -

The general character of Plt^f as to y species of crime charged, may in Court be proved in mitigation of damages. 1 Rob. 384. 400. But these particular acts of the same kind as those charged cannot when y charge is of particular acts. See when the charge is General. see Bull 296. Pea Evi 2. 6. Sub Ct 1807. - no such general. Rules till lately at least in England. Semb. Phil Evi 40. 6 Mass 578. 1 John 46. "Evidence 5" But it seems of late y Court Rule is adopted in Eng!!! 1 Mass at Fel. 284. 2 Corp 257. Pea Evi appx 32. Person charged, Plt^f general character in point of probity and veracity impeached. Perkins vs Swan. C. C. N. J. 1820.

Justificⁿ. In Eng a Special Justification can't ever be given in Evidence under the general Issue, as that y words were true. It is inconsistent with the general Issue. or Pea. 4. Co 10. 5 Co 125. Co 2. 38. 2 Cr 1200. Doug 33. It can always be by Ct of Pleadings in Court.

Truth of words. In Eng. the truth of y words cannot be given in Evi even in mitigation of damages For 1200. Co 2. 578. But 388. cited contra. Where it is not admissible or possible? See analogy. "Little Apant and Batt. 15"

One Recovery of damages is a bar to another

action for y same words, an y words are actionable per se or not. Its subsequent action will lie even for subsequent damage. *Ex D. 519. Bul 7.*

Formerly necessary to know the words precisely as said, now sufficient to know the substance. But y sense and manner must ^{be} y same. As the personal pronouns must not be confounded as "he" for "you" *Ex D. 521. Bul D. 2 Roll 718. 4 TR 217 & Do 150.*

In actions of Slander in general. Plff after proving y words stated may give Evi of other words of a similar kind spoken at another time & even after the action brot. Tard to be in aggravation of damages. *Ex D. 518. Bul 10.*

But damages cannot be recovered for such words for first, words not actionable may be proved. 2^d Words actionable (wh may also be thus proved) are a foundation for a distinct action *Pea Evi 22. 74. 1 Corb 49 2 Do 13. Cth.* The distinction formerly taken viz that words not actionable might be thus proved, and that actionable words, can't. The distinction is now abolished. *Phii Evi 134. D. 1 Camp. 49. and early Subra.*

3^d Words spoken after action brot may be thus proved. The Real object of them, must be not to recover damages, for the words not laid in the declⁿ. but to show malice in the Def. tho they may thus have the effect to aggravate damages, for the sum laid *Bac or Bul 7. 10. Ex D. 520. It 621.* The same rule holds as to proving other libels, to show malice, *Ph. 134. Pea Evi ^{case} 74. 166. 2 Selw 938.*

28.

1 But when words spoken at another time are given in Evid under y rule, y Ct may prove them true to rebut the inference, of malice. Eo 578. Bul 16.

But words not stated and spoken at a different time, must be admissible, & similar to those charged. 12. wh affect Plt's character in y same point. wth the words laid as both impeaching his integrity or his conduct in office. Eo 578. 20. Bul 16. (Saying same words only. Bul 16. "words, similar" Eo 578.

The Eng Ct of Limitations in a slander is 2 yrs from the time of writing it. It extends in construction only to actionable words, for in case of words not actionable, the special damage might not accrue. till after a time (yet y words of the Ct are within 2 yrs after the words have been spoken. Eo 579. 1 Ed 95. Count Ct limits the action to 3 yrs. does not extend to words not actionable.

Generally a joint action of slander by two or no two will not lie* it is not a "Tort," wh supposes an act of course no jt wrong. Seeus of Libels Port 36. § Mal Puff 39. 40. 2 Bac 934. Eo 574. Bul 5. 1 Com. 2. 195. 2yer 19. n 4 Bac 571. Yelv. 120. 13. 3 Bl 117. Ergo lies not w 2. § y right violated cannot be Pt. Ergo it lies not w 2.* (for y reputation of it is not w of B")

But 2 partners in trade may sue Pltly for words spoken of ym. as such when special damage is sustained, by the firm. Here a Pt right or interest is violated § 2 § 117. a n. damage is Pt. Suppose y words actionable in themselves and no special damage alleged. § The sed Williams Sergeant thinks y action wd lie. 2 Saund 117. a n.

and why not? actual damage wd be Pt damage, implied or presumed. wd ergo seem to be so. § § sees no reason wh y action woud lie, he sees no ground for y doubt, why it woud lie in y latter as well as former case) No case of y kind

Slander by writing Libels.

Com stands for 2d sometimes in writing
As to y nature of Slander by writing or libels.
First whatever words wd be actionable if spoken,
are clearly so when written. 3 B & 504. 3 Com 126.
3 Bl 126 or 4.

But written Slander is a more aggravated
injury, as having a more extensive circulation
being more permanent, and being always deliberately
committed. 3 Bac 490. 3 Com 126.
4

Hence the rule don't always hold "e converso"
tho' 3 B 504. says that it differs from Slander
by words only in this, that it is delivered in
writing or printing see also 3 Bl 126. But y
is incorrect, words written are in many cases
actionable, when if spoken they wd not be so.

Definition of a Libel.

Any malicious
defamation of a person (living or dead)
made public by writing* and tending to excite ^{or by} ~~or by~~ ^{printing}
resentment in y object of it or to expose him
to punishment or odium or contempt or ridicule,
is a Libel. 4 Bl 128. 1 New 300. 4 Bl 107. 3 Do.
490. 1 Hawk 398.

This definition seems to have been framed with
reference to libels chiefly considered as a public
offence as dead persons exciting resentment.
Post 30. C^t here y person is not in existence
and no other can maintain an action.

So for libels in general there are 2 remedies
one by Indictment or by criminal prosecution.
The other by civil action But when y libel
is up on the memory of the dead, there is no
civil action. 3 Com 125. 3 Bac 462. 5. Title Libel.
Bl

It is ^{said} ~~the~~ the general rule as to oral slander, apply to cases of Libels considered as civil injuries. This is true as far as respects y affirmative rules describing actionable words, as that written words falling within y description of any of y four classes of actionable words are libellous. As words charging an offence wh wd expose y subject of them to punishment. Co D. 504. 3 Wils 403. Str 808. 3 Com 126.

But the negative rules as to y actionable quality of words spoken, don't always apply to words written. Post 35.

But nothing in general is construed as a Libel, wh is necessary in the course of legal proceedings. As in a declar^y complaint or affidavit. Je Co D. 505. 2 Bate or Bur 807. as in y case of words spoken ante 21. Je

32. The action lies not for publishing a true account of a Trial in a Ct of Justice, tho Pltff's character is injured by it. 1 Bat P 523. 3 Co R. 110. n. 8 W. 293. 1 Co R 46 458.

On a civil action y truth of a Libel, as of words not written, is a justification. 1 Str 794. 4 Com 154. Hob 253. 2 Mod 166. 11 Mod 90. 4 Com 154. 3 Co 125-6. Boul 8.9. Contra once holden. 4 Bac 576. no law 3 Bac 400. 5 W. 278

Secus on a criminal prosecution at C. Law. 3 Bl 1. 5. 4 Co 157. Str 498. 5 Co 125. Tho falsely aggravate the guilt. 4 Com 150. 2 Mc Nally 648. nor is the bad reputation of y person libelled, a justification. 2 Mc Nally 649. 7 W 4. For its tending to a ~~true~~ breath of peace, is what renders it a crime.

The object of a prosecution is not reparation of a civil injury, but punishment for endangering the public peace.

Where a attack is upon private character, is not a rule reasonable? Truth of words is a Justification, under Const. Co. 335. I G. Munk v A Law rule the correct one, so is it when attack is upon public character.

It is essential to a construction of a Libel, & it be published, & modes of publication are various. Writing it originally seems to be sufficient tho' dictated by a 3^d person, this being an essential part of a making of a Libel. E/b D 570. Carth 405. 5 Mod 163. 2 Mc Mally 642. 142.3.

But merely transcribing without showing it to any one, is not a publication but it is evidence of a publication, if the Libel be made public. E/b D 570. 9 Co 59. Salk 418. Proof of transcribing is no part of Publication.

But composing it, procuring it to be composed, reading it to others after one knows & consents, declaring it or showing it to others, knowing & consents, sending it in a letter to a 3^d person, fixing it in a public place, amount to publication in Law. For to be wilfully or wrongfully instrumental in making it public, is to incur the guilt of actual publication. E/b D. 570. 9 Co 59. B. 5 Co 125. B. 3 Bac 407. 1 Law 185. 2 Mc Mally 643. La Ray 341. Salk 418. 2 Bl C 1038. La Ray 417. 86.

As to Public Character, truth ought to justify the Def. I think.

Libeller The Libel in the shop of a Bookseller;
 Public? Is like, is "prima facie" evi of a wilful publication
 by him. The "Onus" is on the Bookseller & Mc Nally
 644. Barnard. 306. 3 Bac 497. 12 Vern 229. Esp D
 570. 5 Burr 2687.

So of a Sale by a bookseller's servant, it is "prima
 facie" publication of it by a bookseller. 2 Br R.
 1038. 2 Mc Nally 644. 5. So of printing by a servant
 is "prima facie" evi as such. (Sub) 2 Mc Nally
 643. 2 Bl R 138. - 1038-

But this presumption may in all cases be
 rebutted. The sale or printing was by the
 Master's orders, or clandestinely without his knowledge
 that he was delinquent or sick and unable to
 attend to his business, that he was absent. 2 Mc
 Nally 648. 2 Flow - 131.

Imprisonment is prima facie a satisfactory excuse for a
 Master 2 Mc Nally 648. 2 Hawk - 431. Servant is also
 liable Ibid.

Ignorance of contents how far an excuse? 2 Mc Nally
 648.

So sending it to the press for publication, is a
 publication in Law. and the person sending, guilty
 of publishing when it is printed. For it is published
 by his procurement. I qui facit &c. Torkington. 570.
 5 Co 125. 2 Burr 807. 5 Do 2685.

Singing

34.

Singing it in a presence of others, is a publication
 Esp D 570. 5 Co 125. 2 Burr 807. 5 Do. 2686.

But repeating part of a Libel in conversation
 without malice, has been holden no publication
 But a absence of malice ought to be very clear.
 Esp D. 570. 2 Mc Nally 643. Mc. 627. 513. 1 Hawk 135.

Writing and sending a Libel to y person who is the object of it, is a satis publication, for a public prosecution, as it tends to breach of peace. 4 Com 156. 1 Hawk. 105. 3 Bac 497. 4 Bl. 50. 10 Poph. 139, not so for a civil action, as this sending is not a communication of it to others, and of course no injury to y reputation of the person to whom it relates. Hob 63. 215. 12 Co 35. 1 Mod 58.

If the letter was a friendly consultation, it ant satis for a public prosecution. 10 Poph. 139. 2 Bardin 157. clearly not actionable. I think not indictable. I think this case must depend upon its own circumstances.

Are all Libels wh support a public prosecution actionable? 3 Bac 482. 3 Com 128. So it wd seem from some opinions but it cannot be universally so when written of a dead person.

Words written are many times actionable, when if spoken they wd not be. 1 B et P 331. 1 Saund 120. 2 Show 313. 1 Mod 58. 4 TR. 752 arg. 1 Str 809. 2 Bac 492. 2 H Bl 532. arg. ante 31.

Not only y classes of actionable words already enumerated (ante 2) are libellous when written and published but writing and publishing any thing falsely wh makes a man odious, or scandalous, is actionable 3 Bac 482. 2 Wils 403. B et P. 331. Quere if it tend to ridicule only? So by S.G. publishing "rogue" or "Rascal" of a man is sufficient. 2 Wils 404.

So of a writing tending to disturb domestic peace, said by Bk 500 to be actionable -
Quere to maintain a civil action?

Writing or publishing of one, y^t he is a Swindler is actionable. 1 T R 748. Secus if spoken. 2 H Bl 531.

The offence and injury of a Libel are considered as repeated or continued in every stage of its circulation. Therefore venue is not changed in Eng. if y action is brot. in any country where tis circulated 1 T R 571. 647. Mil 178.

It is not indispensable to y construction of a Libel, y^t libellous matter be so direct and explicit, y^t every reader wd understand its application.

Tho' y printing expresses only the initials or one or two letters of the name of the person to whom tis intended or feigned name, tis a Libel if the manner is such as to identify y object. 3 Bac 493. 1 T R 194. Bk 570. 2 alkes 470.

An action or Indictment for Libel will lie vs several &c Defs. for y publication is an act in wh two or more may join. Bul v 2 Bun 584.

True,

In an Indictment for a Libel, if the Jury find the fact of publication, and y "Immuenda" they are bound according to the C Law rule to find Def guilty. They have nothing to do with the question of actual malice or an y matter is libellous. These are points of Law arising from y face of the Record, whether libellous or not appears from a General verdict & for as y matter appears libellous

especially upon the Record, a general verdict of Guilty in this action, is equivalent to a Special one in any other as a Special Verdict on an Indictment for murder, and the matter is libellous, malice is implied. 3 TR 428. Talk 417. 5 Burr 2660. 2 Mc Nally 580.1.

Suppose then Def actually published, but that he had some excuse as Insanity, or confidential nature of the writing &c ante 18. In such cases, or Jury shd not find of publication. So or Ct wd direct, for or act is not criminal.

In this country a different Rule prevails. The Jury are at Liberty to Judge of the Law, as well as the facts, under the direction of or Ct. as in all other criminal cases. So now in Eng by St 32 Geo. 3d 2 Mc Nally 657.

Third. Slander with words or Libel with the writing- 37

Slander of this kind consists in emblematical representations as Pictures, Signs, effigies, as raising a gallows before one's door, and hanging him in effigy. Co 3 51. 5 Co 125. This is equivalent to a charge of a capital crime.

So in erecting a Lamb before another's house and lighting it, sign of a Lewd house. 11 East 226.

So to conclude painting a duck on a physicians door. Quack.

Representing one ignominiously by painting,
 or painting one's likeness with aspersions,
 or in the act of perpetrating a crime or in
 any scandalous or ridiculous act or situation -
 In such cases the application must be
 made by Immuendo and Arment. 3 Bac 491.

In declaring for this Species of ^{Libel} damage it
 is said Special damages must always be
 shown. not actionable in itself.

Otherwise the said of import and application
 of it not made sufficiently certain.

Ex D 511. 3 Com 125. 6. There for the declaration
 of the Spectator are Pri of the Identity of
 of party Libelled. 2 Corp 516.

D G Munk, this an Extraordinary Rule.

The action is case founded upon Ex St of
 Merton. 2.

By the Court St. common Slander is
 punishable as a public offence. St Com 229.
 Fine not exceeding 34 s. to county
 Treasurer. - never inflicted - this last
 repealed in part -

Form of Slander.

Indorse A prints a Libel in A. and it
 circulated to B. he is guilty of publication in
 both places.

Action of Trover.

In what Conversion consists? 394.

Who may maintain Trover. 398

Fundamental distinction between Trover & Trespass. 400.

Against whom Trover may be maintained. 404. For what does Trover lie or lye 406.

Pleadings 408.

Action of Trover.

The action of Trover originally lay only in cases where one found y goods of another, and refused to deliver them on demand, but converted them. Hence called the action of "Trover and conversion." Hence also Assumpsit by "finding" - 3 Bl 152. 5 Bac 256.

It now lies in many other cases. The action is derived from the Pl. of Westm. 2^d. 13. Edw 1. 3 Reeves His Eng Law. 58. 2 Abri 202. 3. 298. 391. It is an action on the Case.

It now lies by fiction vs any one who tortiously takes the goods of another. 5 Bac 257. Cro E 824. Cro J. 58. (but Dub.) Esp^r 389. 1 Mod 31. 5 Bac 257. Cro E 824. Cro J. 58. Nim Secus. In more^r cases y force and arms are waived in point of form. otherwise an action on the case wd not lie.

And in all cases in wh one who is by any means. possessor of another's goods, sells ym. destroys ym. or uses ym wth right or wrongfully refuses to return them on demand. 3 Bl. 153. Bull 33. Cro E 781. 5 Bac 256. 7. Bri Ari 33.

The first instance of this action in its present form. was in the reign of Law. 6. But actions of a similar nature have been brot in y reign of Hen 8th. 4 R H E L. 526. 385. 5. 6. 385. 6.

The fact of finding is now immaterial, Conversion is the gist. Finding generally. tho not always stated in Eng. or here. not indispensable. Esp 587. Bull 33. 5 Bac 295. 75. 2 Bull 313. For y manner of obtaining possⁿ is now but

inducement *Ibid.*: Finding not traversable of course, as mere Inducement never is. It can't be Specially denied by a Traverse, but Def may deny under the General Issue, yet he ever had possⁿ of y goods.

It has superseded "Detinue", by the less certainty required in describing and freedom from wager of Law. 3 Bl 153. General definition of a "Conversion" "a wrongfull assuming to dispose of goods of another, as if they were one's own" 6 Mod 212. 5 Bac 257. 2 Bull 280. 1 Sid 264. "Ex vi terminum" "Therefore tis tortious"

The Def is by the form of y action always supposed to have gained possⁿ lawfully. But y action, lies (but Sub.) as well where the original action was tortious. 5 Bac 258.7. Cro. 50. 1 Burr 31) as when lawful, y gist being of "conversion" and this may consist either. First in an unlawful taking. 2^d in an unlawful User. 3^d in an unlawful detainer. The evi of conversion in these cases is different. There must be a Misfeasance to constitute a conversion. Co. 59. 5 Bac 258.3. Falk 655. *Infra* 5 Bac. 257. 1 Role 6. 3 Bac 258.2

These acts are respectively a "wrongful assuming" &c ut Sub. First. A tortious taking is itself a conversion, in Law. Co. 58.9. 5 Bac 257. 1 Sid 264. 2 Sid 200. no demand necessary. Co. 58.3. M. 140.

Trespass is concurrent in such cases. Trespass is founded on the fact. To waive it is waive it as such: but tis founded upon it as a conversion: In other words waives it "quoad y

y form of declaring, but is founded upon it in *Cri.*
Post Burr. 31.

2^d By unlawful user. This supposes *Def. poss^r*.
 lawful. as using a thing found. bailed. *De. 1 Bac 257*
1 Bl 221. Cro E 219. For this is a "wrongful assuming" to
 to dispose of y goods of another. as if they were one's
 own. *5 Bac 257.*

When the Taking is not Tortious there must be
 some *Cri* of an actual conversion. as in y following
 Examples. *Es 580.*

Misusing a thing trusted to ones care. found *De.*
 is an unlawful user. & so a conversion. *1 Bl 221.*
 As a carrier of a box of goods breaks it open and
 sells it. *2 Talk 625. 650. 2 Bulo 312. 2 YR 783.*
 So destroying them as throwing paper found into
 y water. *Cro E 219. 3 Bl 133.*

So by selling them *Bul 131. Coup 419. 2 YR 144.*
1 Abia 387. 6 Abia 697. But if y bailee of goods
 destroys ym. *Trespass.* it is said is concurrent
 with *Trover.* *Co Litt 57. a. 5 Co 13. b. 2 Rolle 550.*
5 Com D 581. Mod 248.

Bailment is extinguished by so wanton an act,
 see *Bailment.* according to *Co.* it shows original
 Intent. to destroy ym. & I conclude. renders his
 poss^r tortious. "at initio" see *Trespass on things*
Personal.

Drawing a cask of wine and filling part of it
 with water, is a conversion of the whole. *Es 581.*
1 B Com 221. Str 7576. This is a wrongful
 assuming *De. (ut Sup.)*

But a negligent custody of a thing is not unlawful user. *Est* 580.1. 590. not a Misfeasance *Sub. T. Est.* 281. 8 *Co* 146. So no conversion.

As Finder of cloth suffers it to be moth-eaten, So if perishable articles are permitted to perish for want of care. *Exo E.* 219. *Ld R* 209.

1 *Bac* 48. 1 *Bras* 1 *Pow* *Contracty.* 252. *Jones* 48.

Ld Ray 917. 5 *Bac* 258. *Hob* 17. *Salk* 650. 143

1 *Role* 2. 6 *Ld Ray*. 5. 5 *Burn.* 2827. 1 *Bac* 243
5 *Ibid* 269.

Special action on y case lies in cases of y kind. *Est* 590. *Salk* 650. *Ld Ray* 917. *Pow C.* 252. *Post* 48
Est 581.

If carrier loses y goods. Trover lies not. *Salk* 650. 143. *De* (nt *Sub*) No misfeasance. When liable for loss by neglect, misfortune, or y act of a Stranger, y remedy is by a Special action on the case. Detinue being denied.

As Timber on B's lands. A asked leave to take it. B refused. B was holden not guilty of a conversion, no Intermeddling, no Misfeasance.

5 *Bac* 259. 29. 2 *Buls.* 319. 2 *Moore* 240. 5 *Bac* 174. 8.
2 2 *H Bl.* 257. 8. *Post.* "Battery." 259

If conversion consist in selling y property of another. Indeb *aff* is concurrent. *Bulle* 131. *Cowp* 419. 2 *JR* 144. 1 *ibid* 387. 5 *Ibid* 697. to recover y money it sold for. The action is for money had and rec^d. If then there is an unlawful Taking and subsequent Sale by y wrongdoer, y Owner may have Trespass. Trover, or Indebtus *aff*, at his election.

3^d Unlawful Detainer is a conversion as if y def. finder, bailee &c wrongfully refuse to deliver on demand. If indeed there has been

an actual conversion as by using destroying or selling &c a demand and refusal, and necessary to the right of action. This & possession was lawful. *Est 589. 90. 1 Sid 264.* For there is a conversion without demand, a conversion by an unlawful user, and of course cause of action is completed.

But a refusal to deliver on demand, is not of itself a conversion or unlawful Detainer, for it may be justified as suppose there is not satis Evi of ownership accompanying a demand. *Est 590. 2 Buls 312. Cowp 829.*

So Def may have had a Lien on y property as an Innkeeper. 2 Show 161. 2 *Ed Ray 752.* *Est 582. 2 Burr. 936. 4 Abid 2222. 21.* So it may have been destroyed without Def's fault, or so lost or stolen. *Talk 655. Est 590. 5 Burr 2827. Ed Ray 752.*

A demand and refusal ergo are only Evi of a conversion or unlawful Detainer. *Est 590. 1 Roll 131. 5. C 50. 3 Bb 153. 2 Show 179. Hob. 187.* & per se *Prima facie* Evith only. 10 Co 56. b. 37. & *D. Est. 590. 3 Burr 1243. 2 H Bl 135. 6. * Denied 6. mod. 112.* & said to be conversion *moor 460. Cowp 829.*

But if the refusal and justified by Law, y presumption becomes conclusive Evi to y Jury of conversion for then Detainer is of course unlawful.

But if y Jury find only demand and refusal the Ct can't give Judgment for Plf. *Est. 590. 10 Co 56. Cro E 97. 495. Hard 48. 3 Burr 1243.* This wd be a Special finding, but imperfect

"a remore de novo" awarded. A Finder of goods has no Lien on them at C Law, for his Expenses and trouble. 2 H Bl 254. 2 Bl R. 1117. and therefore cannot justify a Detainer, under such a claim. Of course liable for this action, after demand, if he detain for this cause. "Bailment" Of one having goods of another put them in y hands of a 3^d person. vs y command of the owner. This is conversion. Ck 581. 4 TR. 260. Servant is liable to a conversion for himself. This for y use of his Master. and even by Master order. Ck 580. 6. 1 Mills 328. St 813. 1 Bl. 220. But 47. quod vide 2 Mod 242.

Who may maintain Trover?

In general any one who has ^{any} Interest in goods converted by another, may maintain y action.

It is not necessary for Plt^f to have had y absolute ownership of y thing. As Bailor may maintain the action vs a 3^d person. he having the General property. 5 Bac. 261. 2 Role 561. 1 Sid 438. Sack. 214. "Bailment" But this rule doesn't hold in he had y right of possⁿ. at y time of y conversion. It is said however he may have case vs the wrongdoer for injuries done. while the exclusive right of possⁿ is in Bailor. 1 Ch. R. 167. 2 Ph. Riv 133. 4. 1 Lev. 209. 359. 60. 8. John. or Domes. 432. 11. ibid 380. 2 Ch. Pl. 329. n.) i.e. a Special action on y case for injury done to his reversionary interest. 7. TR. 0. 4 Ibid 489. 1. ibid 480. 8. John. 432. "103" "Bailment" Trespass.

To a bailee having Special property may maintain
 y action vs a Stranger. 1 Bet D. 44. Pea 40 3 Exp 140.
 1 Com D. 218. 1 Role 4. + La Ray 32. as a common
 carrier. a Special carrier. agisting Farmer. &c.
 5 Bac 163. 262. Mod 540. Talk. 143. Ek. 377.
 1 Mod 31. So I conceive of every class of Bailees.
 For as vs Strangers. They are y owners. Special property
 is sufficient.

If goods are sent by A. to B. not to rest in B.
 but to answer a particular purpose. for A.
 & that purpose fails. A may have Trover. for ym
 after demand and refusal. 5 TR 218. 495.

To a Thief who has taken goods on Est. may
 maintain it. 1 Lev. 258. 282. But 33. 2 Saund 47. n.

To Lessee for y^r. of a house blown down. may
 have Trover. for y timber vs a Stranger. But 33.
 Ek 377. "Bailee" by reason of Special property.

To a Lawful poss^r alone. or a poss^r acquired
 under claim or right, whether actual, rightful or not.
 gives a right to maintain y action vs all. but
 y owner. As where one finds goods. Ek. 375. 1 Bk. 218
 For 505. Bull 33. For 777. This gives him a kind
 of property. wh will support y action vs 3^d persons.
 2 Saund 47. a n. En E 819 J. C. 5 Co 24. l. 3 Mil 832.
 Where rightful poss^r implies a Special Interest.

To if on a disputed Title to goods between A and B.
 A claims poss^r of y goods. as his. he may have
 Trover. vs a Stranger. even tho the Real Title should
 appear to be in B.

But the poss^r must be acquired either legally
 or under claim or colour of title to entitle one
 to y action, for if gained wth colour of right. 2 Saund
 47. c. m. it gives no Special property as vs stranger 3 Mil 338

As if one take goods or steal ym confessedly,
as a mere wrongdoer, without a pretended right.

So a right of property is sales, as when Def
having goods of P^r was obliged to deliver them
to P^r. P^r's creditor. action Lay. Eb 576.

1 Buls. 68. 1 Bb. 219. 1 Bac. 242. 1 T R. 480. 1 Rolle 606.

7. T R. 9. Tho p^r never had possⁿ 2 Lamm. 47.
For a right of possⁿ implies an interest.

But a property of some kind is necessary, as where
P^r had sent an order, for goods to be delivered
to his Servant, and y tradesman delivered ym.
to the Servant's host. action lay not vs. y host
in favour, of y purchaser, for no property vested
in him & for want of delivery. Bul. 35. 6. Falk 18.

3 P^r 186. Eb 576 He had therefore neither
y possⁿ, in fact, nor such property as draws after
it a possⁿ, in Law, or right of possⁿ.

Seas if they had been delivered to Servant of
P^r. Bul. 36.

Fundamental distinction between Trover & Trespass.

former

The founded on property, y latter on possⁿ. But
as vs a wrongdoer, whose original possⁿ is tortious
sem. This distinction don't practically apply, since either
Trover or Trespass will lie. Tho in legal Theory,
y action (if Trespass), is founded upon P^r's possⁿ,
if Trover upon his property. It holds, I conceive,
in point of fact, only, when his original possⁿ,
is lawful, as in case of Bailee, finder &c. who
converts y goods. Bailee &c. In the latter case
Trover lies vs Bailee, &c for Bailor or owner,
on the ground of property only, y actual and legal
possⁿ at y time of conversion being in Bailee,
&c. But Trespass lies not in this case vs
Bailee, &c by reason of his actual & lawful possⁿ.

as trespass is founded on an injury to prop^y. But as
 as a stranger, taking of y goods from Bailee &c. Trespass
 is concurrent with Trover. In point of form,
 however. 12. in declaring Pl is always supposed
 out of prop^y. at y time of conversion. Bul 35.
 Eb 576. 5 TR. 9. 4 Ibid 489. 1 Ibid 480.

Formerly Ex &c cant maintain the action, for
 conversion in Testator's life time, now he may by the
 Equity of the St & Law. 3^d. "de bonis asportatis" 2 Bac
 438. Eb 758. 589. 1 Bl 219. Cro E 379. 377. 1 Str 60.
 12 Mod 168.

So of an adm^t who not named in the St. The
 common Law was founded on the maxim. *actio
 personalis moritur cum persona*"

Said to have been holden that an averment of
 conversion in Testator's lifetime is supported
 by proof of taking in his life time & conversion
 afterwards. "for y time of using say in y knowledge
 of the Def." What Then! 1 Bl 321. Eb 589. Str 60.

But y Ct considered y conversion complete
 in y Testator's life time - The Taking is tortious -
 Eb 589. 1 Vent 260.

Bailee's right to y action is said to be founded
 upon his liability to Bailor (12. if so at all.) &
 conceive y possibility of his being liable, on his being
 accountable &c This always exists. 1 Bac 249.

5 Ibid 169. 164. 5. 13 Co 69. Fich 89. 92. 5 Burr. 262.

Co Litt 89. 1 Sid 438. This Special property is
 y foundation of his right.

Doubted in y case of depositary - 5 Bac 165.
 Pl^m 22. Do nt y Special property wh he has
 sufficient? Jones. 112. Case of Linder (Sub) prop^y

"Bailm^E"
 6-7-

alone is satis, besides he may be liable.

by D.F.
even if y
delivery
back. is
pending
y action.

If one delivers to a y goods of D.F. y bailee by delivering them back to Bailor exonerates himself from D.F.'s claim and such delivery is sufficient to bar an action. * 1 Bac 237. 42. 1 Role 606.7. Tich 137. # suppose ~~pending y action~~ y Defi knowing the Property to be D.F.'s has refused to deliver to him. Is not this Crim of Unlawful Detainer? y recovery is not accompanied with any such qualification.

Recovery by Bailor, oust Bailee of his action for y full value. and "vice versa" 13 Co 60. 5 Bac. 168. 263. 2 Role 569.

To ~~claim~~ by ~~him~~

He bailee by suing y wrongdoer first. oust Bailor of his action. ("Gentle" commencing y action attacks a right of Recovery. So if Bailor sue first. Bailee is ousted of his action of Trover, for y full value. (but he may have an action for his Special damages. "Bailmt" analogous to appeal of robbery by Master and Servant. He who begins first Dc. 3 Bac 559. Tich 127.

bringing an action

property

Bailor by ~~being~~^{being} wrongdoer discharges Bailee, for he elect his remedy. Gentle. If bailee sues first, he makes himself liable to Bailor "Bailmt" Said 13. Co 60. That he who has y Special proof shall have Trespass in this action vs him, who has the general property. see 7. TR. 12. Quere. y Bailee may doubtless have "Special action" on y case to recover Special damages. 5 Bac. 18.5. 266.

Why Trespass or Trover vs Bailor? The action is not for the loss of y property but for y use of it.

of y Special Interest. The value of y property of y property is not even *prima facie* y rule of damages.

Generally returning the goods, (after conversion) to P^lt^f doesn't oust his right of recovery, it mitigates damages only. E^lb 581. 5 Bae 266. 6 Moa 212.

E^ls D. 148. 1 Bl 221. 1 Role 5. 6. 40. 2 BB R 902. 5 RR 696. But when the conversion consists only in a Tortious Taking, if Def delivers it on demand, there can be no damages. 1 Burr 31. ante.

For the Trespass, as such, (or y taking considered as a Trespass) is waived in this action and that is y only conversion complained of - of course there being no damages for the Taking, there can be none at all.

Aliter if Trespass were brot.

Recovery in Trover rest y property converted in Def^l ni when it has been returned. E^ls 593. 1 Show 146.

So 1072. 5 Bae 257. Otherwise the P^lt^f wd be entitled both to his property and also y value of it in damages. Indeed he might by repeating his demand, maintain any number of successive actions.

A Former recovery vs a Stranger is a good bar La Ray to y action. E^lb 593. E^ls D. 73. There can be but one recovery. E^lb 593. So 1072. That is supposed to restore y P^lt^f to his rights. As suppose conversion by A and B. & C. P^lt^f recovers in an action vs A alone. This bars his remedy vs B and C. And the Rule holds tho the Indaginto vs a hasn't been satisfied vide. Trespass.

So a recovery in Debt aff^l y property having

been sold is a bar to Trover for same cause,
 5 Bac 280. 2 And. 1217. And a recovery in Trover,
 when concurrent with the Trover has y same effect.
 Ibid. For a recovery in one of 2 or more concurrent
 actions bar y other or others for y same cause. Cro. 522

Suppose A finds y goods of B. but they are claimed
 by C. and that C sues A. and recovers. Does this
 recovery bar B's right w d. Note y analogies
 to case of Paymt &c under admⁿ. repealed.

3 TR 120. 2 Bull 11. 1 H 36 682. 669. app^d 2 Bull. 54.
 "Bailments"

Against whom Trover may be maintained.

It may be wrongful taker. Bailee, finder &c.

General Rule.

The owner of goods may maintain Trover, not only
 as the first wrongful Taker, but any subsequent holder,
 even a Bona Fide purchaser. For 1187. As Bailee
 or finder (seller y goods) 1 Mil & C 579. 2 Atk 283.

In y state
 no Market
 there.

1 Lev 158. 1 Bac 237. 2 Atk 260. b. 3 Atk 44.

Provided the Sale was not in Market overt.

So if sale in Market overt was by collusion
 between buyer and vendor. 2 Bl 450. C 579.
 2 Leon. 158. "Bailmt"

The Maxim under the general Rule is " caveat emptor"
 exception to the General Rule. As far as relates to
 first taker, in case of money bank notes, &c.
 Bles Trover for them can be lost only as 1st
 Taker, by reason of their currency, when they have
 been paid over, to 3. persons on a "bona fide"
 considⁿ, ergo, he may hold. Reason of Policy.

1 Bun 452. 7 De. 2 Atk 120. 1 La Ray 78. Ex.
 case of a Bank note. Given, & paid away,
 for valuable consideration C 580 539. 3 Bun 576

1 BB R. 485. Doug. 611. "Bailment".

When goods are pawned, pawnee may maintain Trover, vs pawnor after Tender. of money on y day of paymt. 5 Bac 264. Err S. 244. Ek 590. Bul. 72 4 Co 83. 6 La Ray 316. 4 Bl 255. 1 Do 220. Talk. 522.

If pawned on an usurious contract, pawnee ^{or} cannot maintain Trover, till he has tendered y money advanced & simple y lawful interest. 1 TR 153. The action being not to enforce, but to be relieved vs the contract, and Trover being an Equitable action. see "Bailment" This claim to recover y pledge delivered by himself, is considered as standing upon the same footing as wd a claim to recover back a payment voluntarily made on an "usurious Contract" see "Usury."

A Parol gift of goods wth some act of delivery, does not transfer y property. The Donee of course cannot maintain Trover, and y action will lie in such case, vs Donee, if he takes w^of^r. wthnt delivery. Ek 577. 1 Bac 239. 2 Leon 3031.

Quere wthnt demand as the case may be?
M^t not the Gift by Parol be a licence under many circumstances?

But delivering the key of the room where y goods are kept, to Donee, is sufficient. 2 Str 955. 1 East 182. This is virtually giving w^of^r, called a Symbolical delivery. It is not strictly Symbolical however. see "Donatio causa mortis" Co^m and adm.ⁿ

The Tenant in common or Joint Tenant cannot maintain this action for a Chattel Interest as his companion, advantage taken of it in "Not Guilty" Esp 580. Salk 290. 5 Bac 280. 1 TR. 658. Coups 450. 1 Day 301. Possⁿ of one being y possⁿ of both. Sees if it be destroyed by one of ym. yd severs y interest. For such a wanton act by one cannot be deemed to be done in behalf of both, nor of course y act of both. Esp 585. Co Litt 200. a. 1 Cant 363. 8.

Bul 34. 9.

Brought by one vs a Stranger, Plea in abatement is necessary. Salk 290. 2 Lev 113. Cro E. 544. Litt 323. Salk 4. Sir 820. Coups 450-

For what does Trover lie?

Personal Chattels in General-

This action lies for ^{attals} chattels in action. I any kind, tho only C^o of property. The fact need not be alleged. Esp 588. Cro E. 162. 1 Bl 219. Cro E. 537. Cro E. 262. 1 Roll 5. C. 20. 1 Root 125. Coups 117. Esp 543. Salk 130. 283. 654. 2 TR. 708. (Cro E 7203) That it ^{will} not lie - not Law.

9 Mod 51. 29. 122. For Title deeds. Esp. 543. 2 TR 708. see "Replevin" It lies not in General for an animal *feras natura* ni confined and valuable. If not confined no one has property in them. If of no value, y loss of ym. wd be no damage. 4 Bl 235.

Tho for such reclaimed animals, if deemed of any value, it does. as a Hawk. 1 Bl 219. 4 Sha 230. 1 Roll. 5. 5 Bac 263. Tit 56. Feo 283. Cro E 1257.

When wild there can be no property in them. as wild bird or beast of prey on my land -

It lies for tame animals as dogs. Hob. 283. So
in some cases for animals not tame, if confined,
or being merchantable & valuable. As
Monkeys. Farnth. & Cro. J. 262. 5 Bac 264. 1 Bl
219.

It don't lie for a Negro Slave in Eng or Count.
5 Bac 263. La Ray 146. Carth 307. La Ray 1274.
3 Lev 336. 2 Ibid 201. 3 Kel 780. Not a subject
of property in his person. Tho there may be
a property in his services. The action for enticing
or taking away one slave, is a Special action
on the case, laying a "per Quod servitium
amittit" see "Master and Servant"

It lies not for conversion of a Record, because
because tis not private property. This is a public
offence. But it will lie for the copy of a Record.
5 Bac. 204. Hard. 111. Eob 542. being private
property.

It has been holden that it lies not for money,
in a bag. That it might be Identified,
as in Detinue. Cro E 638. 661. J. C. This ant
now considered as Law for in later cases tis
holden, that w^y object is not to recover the property
in specie. But in damages only. it does ~~not~~ lie
for money, not thus circumstanced. 5 Bac 264.
1 Bl 219. 1 Roll J. C. 15. 10. Cro Ch 89. Cro E 818. 841.
not necessary, yt the Specific money converted
be recovered on the Est. but only the same
amt of money.

If Some Covert loses her husbands money at play
Trovee her by husband. 5 Bac 264. 1 Sid 122.
Bull 33. Indeb. Aft seems the most appropriate remedy.

The action being for a conversion of Personal Property only, severing a thing from another freehold, is not Conversion of it. 5 Bac. 207. as taking a door from its place, and carrying it away. Cro. E. 129.

So of an Picture, or Statue, Etc. &c. from a fence. But if the Assent is "expressed" as if of his own goods" a prior severance will be presumed after verdict as in y action for a door. Cro. E. 129.

So of cutting and carrying away by one continued act, a tree or fruit growing upon it, a standing crop. Ibid. The Rule in all cases supposes y Severing and carrying away to be one conjoined act or to be done in continuance.

But tortiously taking a thing already severed (tho it was before a Fixture) is a conversion of a chattel. 5 Bac. 207. May 120. Inver lies. as Taking away a door or window already removed from its place, fruit found lying upon the ground, or previously gathered by the owner.

So If I sever one's fruit on one day and carry it away on the next. Ibid. "Larceny."

Throwing goods overboard to save a ship is no conversion 5 Bac 208. 2 B. & B. 280. The necessity is a Justification. In such case there is a contribution by the Marine Law. See "Insurance & Bailments."

Pleadings in this action

"Pleadings
Analyst
Vine"

Declaration must state a place of conversion, or *in loco* to be ill in substance. E. & B. 508. Cro. E. 128. Where in substance at this time? 2 S. & L. 30. It cannot be Law see Pleading, - to but Form.

Declaration in Trover ought to show property in Plt. But stating "possessed as of his own goods" is satis. For that implies a property. Moor 681. Hard 111. 1 Bl. 222. 5 Bac 291. or 71. Sed vide 2 Lunda 379. Stra 1023. Demand and refusal, not necessary to state: - mere Cvi. But it is usually stated, because originally necessary.

Time of conversion must be averred. Formerly, for y omission of this. Judgment was arrested. Esp. 588. 1 Vent. 135. Cro J. 428. 5 Bac 316. 1 Bl 224. Cro E 97. Aliter now, when y time of conversion was laid before the Trover. This post converted, holden sufficient. De. the Pleist void. But this wd have been on Special Demurer, and if it were matter of substance, it wd be less so after verdict. It can't therefore be matter of substance. It seems now to be mere form, and reached by mere Special Demurer, only. See Little Pleadings. 3 Bl. 394. Carth 389. Cro J 428. 5 Bac 316.

The subject must be described with convenient certainty: formerly with great accuracy. As divers Books. insufficient. 1 Vent 114. 317. 1 Lev 301. Esp 587. 8. 2 Lev 176. La Ray. 99. Bul 37. Str 809. as to y necessity of alleging y value of y goods, 5 Bac 275. Cro J. 130. 47. 8. Lio 88. not necessary kata Esp. 588. Cro J. 148. Quere. Esp. 407. 2 Lev 430. 5 Bac 275. Is it not necessary on Special Demurer, at least? doubtless tis cured by verdict, but it seems necessary as matter of Form. see "Trespass."

As a Library of books. good.

"Not guilty" Tii said There are only 2 good pleas in Trover. General Issue & Release. Eob. 592.

1 Keb. 305. & Bac 276.

But many have been allowed Yels. 198. 1 Show 146. Cro & 73. Str 1078. Falk 654. Str 60.

But justification is not pleadable, for conversion as alleged in the decl^r is not justifiable, being "ex vi termini" tortious Bac abr. Trover. F. 2. Justification amounts to y general Issue. I trust however, that any ^{thing} similar in effect to a Release may be pleaded specially as accord and satisfaction - former recovery. &c.

But a Justification, or rather a defence wh justifies y def^r. taking, user or Detainer - may be given in Ple under the general Issue.

Eob 593 Bul 48. For such a defence disproves y alleged conversion, y latter implying a wrong. So in Count under our St.

It is holden that the St of Lim^s in Count. doesnt run vs Trover. even when concurrent with Trespass. & when Trespass, if it had been tried wd have been barred.

Quere ergo an Trover isnt barred in such case.

In Trespass the Lim^m is to 3 yrs. St Count 460.

Finis Finis

Assault and Battery

For Com. read 320

"A Trespass in et animi"

Assault is an attempt or offer to do a corporal hurt by force, but without touching or lifting a weapon or one's fist in a threatening manner, Com. & Batt. C. D. 1 Bac 154. 3 Com 120. Esp D 312.

But is. So presenting a gun - waving a sword, pointing a pitchfork at one within reach of it. 2 Roll 540. 1 Vent 356. 1 Hawk 133.

Any unlawful selling upon the person of another, by an offer &c to beat. 1 Finch Law 202. 3 Reeve 4 Eng Law. 85 3 36. 120. This is an inchoate violence and amounts to an injury, tho' no actual personal hurt is sustained.

But a gesture otherwise amounting to an assault may be explained away by ^{concomitant} words, so as to fall short of an assault, as A lays his hands ^{on B} and says, "If it were not office time, I wd resent the insult" for y intention must cooperate with the act to constitute an assault. not so of Battery. 1 Bac 184. 4 McWhally 3. Esp 312 2 Heb. 545. 1 Mod 3. 10. 207

Words alone then can't amount to an assault and opinions. Contra. 1 Bac 154. 1 Mod 3. 1 Hawk 133. 4. 3 Roll 540. 1 Com D. 590. (C G G) But threats of bodily hurt producing actual inconvenience is an Injury. As interrupting one's business The Remedy is Trespass. 3 Com 320.

Battery consists in y actual commission of 2 violence upon y person of another (Esp 312) The least degree of it done in an angry, spiteful, insolent manner,* is a Battery. As Spitting on the face

treading on y toe. Bac 154. o. Mod 149 1 Com 2.
 380. 1. Hawk 134. Plf defines a battery to be
 y ^{unlawful} immediate beating of another. 3 Com 120. Is a
 battery of course unlawful? for it may be justified
 tho it usually is justified as a Molliter manus
 &c. 3 Com 120. Falk 407. f. Note Where y violence
 is only nominal, y manner only is regarded.
 Aliter if there is an actual serious hurt inflicted.
 Bost & S.

Every battery includes an assault, proof of battery
 therefore will support a charge of ass^t and Batt^y.
 1 Bac 154. Hawk 134. Falk 384.

Menaces of bodily hurt, tho not amounting to an
 assault, (for words alone can't constitute an
 assault") are in some cases actionable Injuries.
 When they occasion an inconvenience, they are
 actionable, &c. non. As interrupting one's
 business. The action of Trespass vi et armis lies
 for it as an inchoate violence. 3 Com 122.
 Finch. L. 202. Com D. B. C. a. 2 Roll 545.
 3 BCR 525.

In Battery y injury must be immediate, i.e.
 y immediate effect or consequence of y force
 employed, but it isn't necessary to a Battery
 that the injury shd be the instantaneous effect
 of the direct act of y wrongdoer, tis sufficient
 if produced by a connected train of effects.

3. In General any wanton act, by wh one causes
 a Battery, supports the action - As Def threw
 a squib into the market place, wh after various
 charges and impulses, eventually put out Plf's
 eye. So an Elastic ball striking a person after
 it had rebounded, 20 or 200 times so a ball
 glancing, 3 Mils 403. 2 Bl R 892. Tr 634. Quere
 bent
 295

So if one pushes another wantonly or carelessly and the latter falls as a 3^d person, y action lies wth the first. Ed 213. Bull 10 or 16.

3 If a horse taking sudden fright runs ^{over} a person, y rider is not liable, n^r he was in some fault, it is not his act. But if a 3^d person ^{wantonly} unlawfully struck y horse, he wd be liable for all consequences & mischief. Ed 313. 14. 4 Mod 550. 1 Ibid 24.
Talk 637. 1 Com D. 589

Bull 10¹⁶ says he is liable in an action on y case. Quere. Talk 237. arg. and Trespas in y case 25.

Is not y wrongdoer liable in Trespas for a Battery? (The horse being considered merely an Instrument employed? Suppose instead of an animal he had put in motion an inanimate body, as a moveable machine or rock, pulled down a precipice. Wd not Trespas clearly lie? Is like turning out a wild bull or Tiger. 1 Mod 24. 3 Mils 354. 3 East 533. 4.

When a person receives a bodily hurt from an act to w^{ch} he consented, he may, (tis said) have an action in some cases, in others not.

Rule if y act consented to, was legal, he has no remedy. As Clurt by playing at Cuagels, he has no action, for y play is lawful. Promotes courage.
Ed 334. 1 Bac 154. Bull 16 2 Lev 164
313-

If hurt by boxing, consented to, he has an action, for boxing is unlawful and consent can't make it lawful. y consent is void and Volente non fit Injuria don't apply. Tal 16. 2 Lev 174.
This Rule undoubtedly holds upon an Indictment for the Battery, but how can the party beaten recover, in a civil action? for tho y licence

does it not
is as such void, yet it ~~don't~~ make him "Particeps
criminis"? That the Parties are both liable to be
Indicted there is no doubt.

So consenting to be beaten don't justify a battery,
Co 513. Com. 218. Bul 17. Quere in the civil action
wd not ^{Com'ly} the above objection defeat it?

But that the injury accidentally happened in
an amicable contest as wrestling, is a good defence.
The consent is good seems so Plf (7200) "
Lawes II"

If in doing a lawful act as in defending one's
self or self. one accidentally hurts another behind
him, he is liable to this action. 2 Bl. R 896.

Ray 468.

(P) A malicious intent is clearly not necessary in General
to subject to the action of trespass "vi et armis" Hence
a Lunatic is liable to it "civiliter" tho not criminaliter.
So of an Infant of any age. For the object of the
civil suit is not punishment but reparation for
damages sustained & he who caused it however
innocently ought to bear the loss rather yⁿ another.
Sack. 13.110. Long 640. 9 Co 339. Holt 134. 1 Tontl
81. Tho' tis agreed as a General ^{Robert} tho not Universal
Rule, yt in case arising "Co Delictis" concurrence
of intention occurs.

But how far accident will excuse an Involuntary
Trespass, has been a question of some difficulty,
According to Tontlome tis satis to make one liable
that he has been "the physical cause" of y
damage. 1 Tontl. 81.

This is too broad a Rule for it wd not admit
of even inevitable accident, as an Excuse—
As one's falling on another—

It is said y^t inevitable accident, or inevitable necessity only shall excuse. In such case y^e injury done, is not y^e act of y^e party excused. It is not in any sense the agent. 1 Rob. 134. 1. Com & 589. 2 Roll 548. 3 Nils 377. 2 B & R 890. Same case 3 Nils 410. It 596. 1. Tont. 81.

The meaning of inevitable accident or "inevitable" y^t no wh human care or strength can't guard, y^t is the accident shd be physically impossible. inevitable (B & R). If so y^e case in Bul 10. seems not to be law. where a distinction is taken between wantonly knocking a drunken man and trying to assist him & a hurt ensues. for in y^e latter case the accident is not physically unavoidable and in 1 Rob. 134. tho' the Co use y^e word "inevitable" agree on the ground of neglect. 1 Bac 154. 5. Esp 313. 63.

The party is said to be excused, "if utterly without (6.) without his fault. 1 Rob 134.

Yet if one defending himself accidentally strikes another behind him, he is liable. So if one firing at a mark, accidentally hit another.

So if his gun shd explode in firing and hurt another. I suppose. 2 B & R 890. Ray 407.

Bull & P. 10. supposes y^t if a horse were ^{used} to run away with his rider, takes fright and in running injures another. The rider wd be liable on the ground of neglect. But here y^e remedy wd be case for neglect, for tis not the riders act. 1 Vent 280. (most of the examples given in wh Def is holden liable) suppose some neglect as the case bout of cutting a hedge of Thorns, wh fell on Plffs land. There was neglect. Ray 467. So in the case of lopping boughs.

So in y case of cocking a gun. Str 596.
4 Burr 2092. Esp 383. So where a timber float
upon B's land. 2 H Bl 257.8. "Trover 54" "action
on the Case 23"

The Rule is clear y^t where the injury is "inevitable"
y Def is excused. As one taken with apoplexy
falls on another. The injury can't be said to be
"inevitable" where y act causing it is voluntary,
ie when the act is not y effect of a cause above
y agent control. 7th. 134. 2 Bl R 806 3 Mils 3rd 11.

The true distinction. I conceive is, y^t if y act causing
the injury is voluntary, Trespass lies tho y injury
itself wasn't intended as In defending myself
I hurt some one beat me. But where one with-
out acting becomes the involuntary instrument of damage
to another, it lies not. As a man walking accidentally
falls on B.

According to some opinions if y act causing y damage
is in itself lawful, and the agent guilty of no neglect,
or want of care, y party is excused. As helping
a drunken man as but in Bul NP. 16th Esp.
579. 313. 17. 5 Bac 168. Sed Quere. The better opinion
seems to be, y^t that y injury to be excusable
must be inevitable. (Lark anth) or at least that
no actual neglect is necessary, to subject the
Def. For here is neglect imputable to an Infant
Lunatic? But in that case y hurt seems
not to be regarded as the act of y assisting -

According to Esp L. a. a trespass to be actionable,
must be voluntary. he cites 4 Burr 2092. Neglect
is said to be necessary, but that was y case of
a deerkiller by Def's dog. The Def can't be considered
as the agent nor y act his in y injury was his

was voluntary on his part. Tocus if he had accidentally killed y deer. The proposition in Eob is too broad and requires modification.

But where y act causing y damage, is itself unlawful, y author is in some way, either in Trespass or in Case, liable at all events, (an there is the least neglect or not) for y consequences immediate or consequential - As A sets fire to B's buildings and y fire is communicated to others. A is liable for y whole. Case of the Quit ante 2 Bl R 893. Vent 295. Id Ray 480. 7 1574. 12 Mod 639.

Have Rules as to accident ably to Trespasser in General.

Defences to this action are of 3 kinds. Denial, Excuse, Justification Bulb 17. Bulb 17.

Assault and Battery are Justifiable in many cases.

1. Com D. 587. 3 Com 120. As an officer having legal process to arrest one may use violence, in case of opposition so far as is necessary to effect the arrest Eob 314. 1 Bac 150. Hawk 130. 8.

But a Battery is not Justifiable in the last case unless there is actual resistance Id Ray 227. or attempt to fly. 2 Str 1049. Bul 18. 19. 3 Lev 403. Eob D 314. Cro E. 93. 3 Ch. Pl. 523. 8 TR 78. 299. 1 Saun 276. 7 nt

An arrest simply will justify an assault only. 18. if to an action for assault and Battery - y Def justifies both by mere authority to arrest. (without more) y Justification is Bl. Tocus if resistance is alleged. Quere an assault or a 'Molliter impossit manus' in making y arrest

Infra. But a "molliter in posuit manus" is a
Justification in making the arrest is necessary
& Justified. And there is no resistance &c.

(This is in strictness not battery) 2 Str 1248.

But 2 Roll 546. 1 Bue 158. 5 Com 355. 12.
Def may plead "a Molliter manus in posuit"
as a Justification of the alleged assault, but he
must in this case deny the force and arms
by the "Plea of not Guilty" Thus as to force &c.
not guilty and as to the residue, "molliter
manus &c." Stating the Special facts wh
Justified it. Pleadings. Apt. 447. 2 Ch Ple
579. 326. 9 Com D. P. 3. 16. 1 M d 36. Post 16.

The Plea of "molliter manus in posuit" it is said
goes in Justification of a battery alleged. See Com-
1 Tanna. 296. n. 1 Post 9. as well as the assault.
5 Com D 355. Skin 387. Cro E 93.4. 2 Bent 193.
Contr 3 Lev. 404. E 314. But not of a wounding,
bruising, & mayhem. by reason of incongruity. 8 TR.
299. 10. The Battery alleged can be justified in
this form. But in other form of Pleadings. Can it
be Justified by a mere authority to arrest.
He can't on this sole ground Justify a battery.
as a Battery.

to the

But if mayhem, wounding or bruising be also alleged
where the only Justification is a mere authority to arrest
Def must as to these plead "not Guilty" as well as
as to force and arms. 1 Tanna 296. 7. nt. The modern
opinions are that Def must plead "Not Guilty"
as to a battery also, justifying only the assault as a
"molliter in posuit" 1 Tanna 296. n. 1 Str 1248. 2d Rep
231. 2 Bent 193. Hardwick 289. E 314. 3 Lev. 404.
It is safest at any rate to traverse a Battery.

Battery is justifiable on y ground of self defence,
3 Com. 120. As if one strike me first, I may
strike him in defence.

So an assault by Plt^f is vater to justify a battery
by Def. If Plt^f lifts a weapon as if to strike.

1 Com 2. 589 Bul 17. 18 E^k 310. 3 BL 120

But quoad y force and arms. Def shd plead
"not Guilty" according to Plangs. apt 447.

Quere Temble. clearly not so. For he may justify
force &c and ^{deny} aver. wounding 1 Saund 79. 296. n.

1 Cro E. 268. 1 Hawk 130. 1 Sid 246.

But there must be proportion between y assault
and the Battery. by Plt^f & y^t by Def. For every
assault however small will not justify any
battery however large. (11 Mod 43 Bul 18) and y proportion
y proportion is a question of fact, in every case.

A small blow won't justify a Mayhem.

But if Plt^f strike Def. a scuffle immediately
ensues. y Plt^f is mayhemed. Def is justified.

Salk 542. 1 Sid 246. E^k 2 310. Seem if Plt^f
gave a slight blow. and Def in return wantonly
strikes so as to mayhem.

The Plea in this case is "For assault done" &c y
first assault preceded from Plt^f. y^t Def struck
in self defence. Plt^f. apt. 447. E^k 2 305 Salk 642.
Pleden

But Mayhem is not justified by Plt^f aggression.
ni y Plt^f acc might endanger def's life or member.
Sa Ray 177. E^k 310. Salk 642. 11 Mod 43. 1 Com.
520. 90.

see *propositio*

As to y replication "de injuria &c" see 1 Pet P.
72. & E 60. "De injuria proposita uno. atque tali causa"

is the Technical Traverse of a whole plea, "On
Assault and Battery".

10 If Plt^f was the blameable cause of a Battery, "tho'
he didn't strike or threaten to strike) Def is
justified in some cases, as where Plt^f Tilted a
seat on wh^{ch} Def sat and Def. bit off Plt^f's finger,
1 La Ray 177. Talk 042. But the Magⁿem in y
last case, seems to have been justified by Plt^f's
attempt to gouge* Def. according to 11. Mod. 43.
1 La Ray 177. & a Kentucky practice—

So when Plt^f thrust his money into Def's cap,
and a scuffle ensued, Def was justified— 10 310.
10 300? 10 310.

Parents are justified in giving children reasonable
correction. A Master his Servant. Schoolmaster his
pup^l. Guardian his Prisoner. 10 310. 1 La 176. 177.
1 Hawk. 130. Bul 18. Williams 107.

So according to some a husband his wife. But
this now seems not Law. 1 Hawk 130. Anll. 80.
1 Bul 100. These Relations constitute Special Justification.
The act is justified by the necessity of Personal government
in the several cases.

A man may justify a battery in defence of
his wife and a converso. So of Parent and
Child. 10 314. Bul 18. La Ray. 62.

11 Clearly a Servant may justify in defence of his
master but "e converso." There is the better opinion,
& conceive the Justification is good. 2 Bul 558.
Bul. 18. 9. 10 314. La Ray 62. 2 Role 546.
1 Hale 484. Talk 403. 1 Bl 429.

But a battery in case of *Trent v. Parent &c.* must have been in defence of the person and to prevent her from being injured; must not be vindictive. *2 B. & C. 218. 2d Ray 22. n. 2d 533.*

So one may justify a battery in defence of his property forcibly invaded, as by breaking a door, gate, &c. But if there is nothing more than mere entry in another's close, (which implies force in Law merely) the owner is not justified in a Battery without previous request to the wrongdoer to depart. *2 B. & C. 314. 3rd 19. Fulk 241. 1 Hawk 130.*

In case of a mere entry on Lands, a battery, the said must in pleading be justified not as a Battery but as a "Molester in possession manus" the necessity of violent resistance is not deemed so great as in prior cases. *But 18.9. 2d 314. 5th 2d Ray 22. Fulk 407. 5 Com 330. 1 Mod 36. 2d Ray 22. 3 T.R. 78. Contra 2 Ch. 22 524. n.*

2 Ch. 22 524. n

The last rules contemplate a owner of property in possession and are founded on his right of defending his possession. But when he is dispossessed or dispossessed a different Rule now obtains, when as to Real property was unknown to the C Law

At C Law one who had a right of possession or entry "12" in Lands was allowed to regain possession by force from the Dispossessor. *2 Bac 555. 3 Com 179. 4 Com 148.*

But now by Several Big Game (y l. of wh. is 5. Richard. 11) one may not enter on Lands &c of wh a nother is in possession (as by holding over after a Term expires) or taking a vacant possession, in a peaceable manner. *2 Bac 555. 4 Com. 148. 3 Com 179. 179. came in Comt 209. RL*

+ or
in some degree

But these 2^d (10 Count) Contempts ^{are} ⁱⁿ some way abandoned by the owner. as in y case of a Lease, in wh y ^{posse} is given to the Lessee, and in case of a Lease, in wh the ^{posse} is given to the Lessee, and in case of Land, y wh y ^{posse} is neglected by y owner and neglect, a casual, temporary absence from one's property as by merely taking a Journey, is not an abandonment, so as to exclude the owners right to use force.

Title "Forcible Entry" Part.

In case of Personal property, y owner is not allowed at C Law to regain ^{posse} by force, ni feloniously taken. 3 Com. 4. 5. 2 Role L 50. 5. 2 Role 560. 3 Inst 134.

13.

Provocation by words. bare words never justify a battery but may mitigate damages. 1115 b. E. 5. 317.

A Servant can't justify a battery in defence of Master's goods. 5 Com D. 354. C. J. E. 242.

Where suppose them to be in his Special ^{posse}, may he not then justify? As carrying them from one place to another. The Rule seems to mean only, yt the Servant can't justify merely because y goods are his Master's.

about
330

Assaults and Battery at different times can't be taken with a "continuando" nor "diversi actus et verba" for an assault is an entire indivisible act. E. 5. 316. Phil E. 134. B. 5. 5. Cor 820. 3 Com. 212. F. 5. 316. 9. and each battery is in its own nature distinct. But doubtless P. may alledge one Battery on one day, and another on another, in y same dect. in different Counts. Suppose batteries committed on several successive days by the same person, on P. he can't alledge ym as a continued or connected

Trespass. Aliter in some kinds of Trespass (as to continuando in Gen Post)

For battery of wife, husband and wife shd join, & Injury shd be laid out, "damnum ipsorum"
For Husb. is damaged by the expense and cost of suing & wife is personally injured and damages wd survive to her. Esh 316. 1 Sid 387.
1 Roll 782. Ld Ray 1208. See Husb and wife.

If laid "ad damnum of y husband only, y declarⁿ is ill and Judgment may be arrested. For he alone has no cause of action for the Battery. He is a stranger to y right of action in for y relation in wh he stands to his wife, not therefore like the case of one of 2 Pt Tenants suing alone for a Trespass on their Pt property.
Esh 316. Ld Ray 1208.

"14"

If Plt^f suing as Husb & wife are not such, it must be pleaded in Abatement. Esh 321.
Str 480.

If a battery has been committed vs husband and wife, he alone must sue for y injury to himself. Esh 316. Ld Ray 1208. 1 Roll 782. Pl 2.
Lidm Cro Jac. 658

If both join in y last case for both batteries, and several damages are given, y writ abates Quoad the husband, after verdict. If 2d damages are given, judgment is arrested in Toto. Esh 316.
Cro J. 658.

Plt^f may lay in aggregation of damages, tis said, many facts wh he admit himself recover for - as assaulting Servants without laying

re late

a "per quod" Eb D 317. Salk 642. 2 Ch. P. 374. m.
 Quere is it to aggravate damages or show directly
 how enormous y Trespass. or rather y circumstance
 of enormity under wh twas done.

On Eng a Justification must be Specially pleaded
 in case of a battery as "non assaut" demerit. So in
 other cases of Trespass. It can't be proved under y
 General Issue. Eb 317. Co Litt 282. b.

But other circumstances not attended y transaction,
 may be proved in mitigation of damages. tho if he
 pleaded. they wd have been justified as was
 spoken by Plt at y time tending to excite mutiny
 in Defs ship. Justification of any other kind, is trust,
 is the same. Eb 317. analogy in Land. Contract.

"15"

If Def. justifies, he must confess the Battery is y plea
 is He. As Plea that Defs horse ran away wth him
 wth his will. &c for there is no battery by Def.
 It is in effect the General Issue. The meaning
 of the Rule is. yt he cannot plead as a Justification,
 what virtually denies the Battery. by reason of
 y Repugnancy. Eb D. 318. Salk 637. 2 Ch. 323 45.
 pl.

The General formal Replication to a plea of non assault
 is "de injuria sua propria absque tati causa"
 Eb 317. 1 Bac 155. 5 Com D. 354.

If Def. pleads "non assault" &c. Plt can justify it
 assault. he must reply to it Specially, for he can't
 give his Justification in Cui under the Gen Repl.
 "de injuria" &c. The defence wd be repugnant
 to that Replication as such a Replication denies
 that first assault was by Plt, but a Justification
 of it admits it. Eb 317. 288.

Matter of Excuse. it is said, may either be pleaded
or given in Evi as inevitable accident. Evi & 317.

Bul 17. Galk 637. 4 Mod 404. But see 2 Cr Pl. 519. n. &
yt matter of excuse must be pleaded

C. & G. General Issue wa seem most proper in such
cases. as the defence is in effect that y force complained
of was not Plt's act.

16

To the Plea of "molesten manus impositus" with a
Justification y Plt may reply "De son tort desmeone
absque tali causa" wh includes a denial of the
Justification or as the case may be instead of
y "absque tali causa" specially traversing any
one material point. or fact in the Plea. 5 Com D 306.
or an outrageous battery "absque hoc mollester de
5 Com D 536. Pl 3. M. 15. Skin 881. Battery Lato 1436.
Here the Inducement is necessary to prevent a negative
pregnant in the Traverse. Skin 381. Lato 1436.
Com D. Pl. 3. M. 16. F. 20. G. 20. 8. Co 67. 1 Brun 320.
Lawes 118. 155. 6. Hob 321. vide the distinction "Pld^m 81"

The Plt ant confined in his proof to y times laid
in y declaration. He may prove any battery. (not
barred in Count by the Pt of Lim^t.) In Eng the
Pt of Lim^t doesn't confine his proof. The Pl must
be pleaded *Secus* in Counts.* So a Special plea
must cover all the times[†] it must be as broad
as the Declⁿ as if a Justification is pleaded
on a particular day. There must be generally a
Traverse of y times before and after 5 Bac 205. 7. 1.
Buls 138. 2. Tanna 295. Cro Ch 228. Hob 104. 5 Ray. 229. 31.
Co. 407. 319. 21. 282. 415. Galk 222. Co Litt 283.
Cro E. 32. Bul 17. 4. Bac 74. Pld^m.

within wh y Plt has a right to prove y Battery.

Need def traverse as to prior & subsequent time, when he pleads "Son assault &c. Semble not. for proof of Plt's assault one day is sufficient to support the Plea. & the Plt is answer to a Novel Assignint (if it was at a diff time) of y Battery complained of. Bul 17. Pld². aft 447.

(As to the averment "una est eadem" &c. 2 Ch Pld². 530. n. 2. Str 694. 1 Mod 36. 2 Saund 5. n. 3. 1 Saund 182. n. 3. 85. 298.

So the Plea shd be as broad as the declaration, as y subject matter, i.e. it must be an answer in Law to the whole gravamen, alleged and y Plea. (or Pleas) must import to answer y whole. See Pleadings 88. As if Plt charges Battery assault and wounding, a plea reaching the Battery and not the wounding is ill. Cro E 208.

"Son assault &c. covers the whole gravamen. E/b 318. for y words are "that the Plt made an assault &c. & that Def then, & there defended himself - & if any damage or hurt, if it happened. &c.

Pld² aft 447. Secus of Molitor Manus imposit ante. That don't answer the allegation of wounding or Mayhem. It Justifies only the Assault and Batt^y. (according to some opinions the Assault only, ante 8.9. For as a Justification of wounding, it wd be incongruous, and absurd. E/b 318. Cro E 268. Pld² aft 447.

In a Justification founded on the Relation of Husband and Wife Servant and Master. &c. the assault &c. Must be averred to have been made to prevent injury to wife, Husband, Master &c. not by way of revenge, chastisement or retaliation. E/b 318. La Ray 62. 2. Role. 456. Str 250.

A former recovery of damages for y same battery, vs the Def on another, is a good plea in Bar. For y uncertain damages are reduced "ad rem Indicatum" 18. The original damages are changed into a Judgment Debt. and are of course merged in it. Cro E. or C 30. Ekb 319. 416. Salk 11. Cro J. 73. 4 Bul 20. Yelv. 60. 5 Bac.

The last rule holds even if farther damages accrued after y first recovery. Ekb 319 Salk 11. So in Trespass generally, a former recovery is a bar to all continued trespasses committed before y date of y first writ. 2 Root 320.

In this action, as in all Trespasses, if y injury is done by Several, y Plt/ may sue all or any, for all causes of action arising "Ex Delicto" an sounding in Trespass or case, are several. 5 T R 681. Do 654. Ekb 310.

As to Severing damages y authorities are somewhat contradictory, if 2 are charged Jly and are found Jly Guilty 18. each guilty of all. (as, they are of course) by a General verdict vs both, y Jury cannot sever the damages for y act of both or all is y act of each. So far the injury is Joint. (Ekb 321. 420.) 5 Burr 2079. or 74. 2790. Carth 19. 11 Co 5. Anke 317. Plam 10. Cro J. 118.

So if Judgment go vs both by default, y damages cannot be severed for y same reason as in the last case. Default being an admission yt they are Jly guilty of y wrong alleged. for y charge against them is Joint and the default confesses it. (Ekb 420. Str 422)

But kata Eo 420. and 2 Str 1140. if Defs sever in their Pleas, as one Pleading the general Issue and another Justification. Ye y Jury may sever the the several Defs are supposed to be equally guilty. w. 100 Dole vs a and 50 vs B. Eo 420.

Str 1140 79. But this seems not Law. and vide contra 11. Co 6. 7. Bull 20. F. C. Cro E 348. 50. 118. contra Eo 321. Cro E 118. see 1 Found. 207. a m.

1792

That the damages cannot be severed see Bun. 2732. Now can a Severance in Pleading vary the Rule? Can it ever be proper to sever, where tis ascertained by the Jury. yt y whole Injury was the act of y Defs? y act of Law all. being then in all, y act of each.

19.

But tis said the Jury may find one Def guilty, as to one part and another as to another, and assess damages severally, & the finding will be good, without Remittitur or Non Pro. 18. yt Def may take Judgment for both. afterwards Eo 420. Cro E 860.

Contra 11. Co. 5. 7. a. ni y different defs are found guilty of different parts, at different times. in that case they are not found Guilty Jointly. But in y other they are necessarily so, y act of all, in one and y same transaction and at y same time, being the act of each. and the Injury is in Law Indivisible

This qualification of C. seems in principle clearly correct. so suppose A commences a battery, alone, and B afterwards joins & assists him. Cro. E 54. Bull 51. 20.

But in cases of Severance where y damages ought not to be severed, Plff may prevent Def from arresting Judgment or reversing it in Error by remitting on the received one, assessmt and taking Judgment for one only vs both. Defs. Bul 20.

Carth 19. 15 Co 8. or Com may go only vs y one vs whom its amount was assessed. Carth 20.

Bul 20. 1 Saun. 207 a n. 6 JR 199. 200. Cro E 239. 243. or if Plff will enter a "Nol Pross" as to y other.

But in all these cases in wh the damages ought to be entire. There can be but one Com 11. Co 7. a. Bul 20. and that issued for one assessmt. only, and if Judgment is entered for both. tis Error. 5 Burr 279c. 11. Co 5. Carth 19. Cro E 118. E 321.

420.

Plff may arrest judgment in these cases, if he so elects. and demand a "venue De Novo" for where the Law requires that the damages shd be entire. he has a right to claim that they shd be found so. Cro Ch. 173. Rob 170. Bul 20. Carth 19.

These Rules as to severing damages hold of actions for St Torts generally.

First Rule is adopted in Court viz yt if 2 are jointly charged and found guilty, i.e. each of y whole. damages cannot be severed. 1 Et 1798. Where Defs pleaded severally. and not jointly.

20.

If one is compelled to pay the whole, there can be no contribution in Law or in Equity. So in other cases of Tort. 8 TR 186. Hobb 116. see also 17. Trespasses for injuries to personal property.

In Eng it has been holden that a "Non Pro. or non Suit" as to one of several Defs, before Judgment, as to the others, discharges the action as to all, & it operates as a Release. see one Hob 575. 150. This is not now considered as Law in Eng. 1 Saund. 207. n. 2. 3. 5 R 511. 1 Will 94. 306. 2d Ray 597. Earth 18. Bull 20. Cro J. 173.

In Eng and Connt. the Ct will give Plf leave to strike y name of one of the several def. out of y declaration and then proceed and call him as a witness. When one Def wishes for the Oath of Co-def. it is a Rule that if there is no Oath vs Co-defendant he may be sworn. If any at all, he must be tried before, he can testify. But y Ct may let a verdict as to him be first taken and if acquitted he may then be sworn. He is then not interested. Bull 285. 2 Bac 287. 1 Sid 441. "Evidence 119. 20"

21.

The Jury may, if they please vary from the declaration and find only a "part as" "Guilty of the Battery" not of y wounding. This is a Rule common to actions of Trespass in general. Est 2. 421. 2 Role 684. Cro Ch. 39. 54. Finding more than is in Issue is idle -

By the Eng practice, if there has been a Mayhem
 & it may or view increase the damages found
 at their discretion, & so no "mayhem" is expressly
 laid in the declaration, if the Judge certifies or
 reports it. That the injury was amt to "Mayhem"
 might not be known at y time of bringing
 y action. But it must be done in Bank.

& Plff must be present, when motion
 to increase is made, for it must be decided
 by Inspection.

This last requirement is derived from the Rule
 that in appeal of Mayhem. "Mayhem vel nim"
 is to be tried by Inspection. Eob 322. 1 La Ray 176.
 Lach 223. 3 Com 332.3. 1 Lia 108. 1 Mil 5.

It must be proved to be part of y same
 trespass for wh y damages are given by Jury.
 Bul 21. Eob 322.

So damages may be increased at Insp.
 in case of wounding.

So of atrocious battery - Eob 322. La R 176.
 3 Com. 333. manner of wounding must be laid
 in the declaration. Damages are never thus
 increased in Count.

Damages are not increased in these cases,
 if the Judge who tries y cause, declares
 himself satisfied with y verdict. Eob 322. 1 Mil 5.

The Jury can't give more damages, you are laid,
 2b 424. 3b 297. But if they do, Plt may have
 Judgment or remitting of excess. East 21. 11 Co 110.
 i. 1 St R 643. 4 Bac 206. This Rule is common
 to other actions.

Every assault and Battery, as said, is a public
 as well as private wrong, and punishable by
 fine and imprisonment. But this Rule cannot
 apply to an involuntary Battery.

1 Bac 106. 1 Hawk 134. 3 Com 121. 4 Com 140.
 210. "Public Wrongs"

Secret assault is a distinct offence under Com
 47. 2b 338. Count. Its remedy is distinct
 from that in other assaults.

Several may be joined when the secret
 assault is by Several. 2b 108.

For the proceedings under this see Count
 2b "Till Peace"

The complaint is a "Quintum information"
 accompanied with a Tith with process. 18. a
 "Criminal Capias" Complainant "must show
 his wounds." Form of the proceeding
 is entirely Criminal.

Plt is allowed to testify de. Def. subject
 to damages and fine. For further particulars,
 see the St.

Kind of assault and Battery-

Assault & Battery. What assault
consists in. 411. What is Battery 411.
Defences to y action Denial. Excuse
& Imposition. 417.

- False Imprisonment

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Of the action of Trespass for
False Imprisonment. nature of &c

Every unlawful restraint of one's liberty or violation of one's right of Locomotion, is false imprisonment. 3 B&C 127. Ebp 326. An illegal imprisonment in a private house. Street Jc. 2 Inst 589. 5 B&C 169. Finch 202.

There are 2 requisites 1. Detention of y person. 2 y unlawfulness of y Detention. 3 B&C 127. 2 Inst 589. 5 B&C 169. Finch 202.

The unlawfulness consists in a want of authority to detain. The authority may arise.

- 1st from Legal Process. Ebp 333. Fulk 408.
- 2^d from Special cause amounting from the necessity of the case to a Justification. Ebp 324. as in the case of arresting a felon, by a private person. 3 B&C 127. It lies not for y crew of a ship captured as prize. Doug. 572. n.

Such cases belong to Admiralty Jurisdiction. under the Law of nations Post. Trespass 49.

original

But every arrest of a person for a civil offence, without legal process, is not good. it is an unlawful arrest or restraint. 5 B&C 169. 2 572.

A custom to imprison in civil cases without legal process is not good. it is an derogation of the right of the Subject. 5 B&C 169. 2 Jones 147.

A private person is not guilty of false imprisonment, by confining a person arrested by a proper officer, at y officer's request. He is even bound to assist y officer on demand, if necessary. 5 B&C 169. P. 24. 2 Role 561.

But an officer having made his arrest on final

process. cannot delegate his right of custody in his own absence. 1 B et P. 24. vide Shff. de.

The most common cases of imprisonment are those of arrest under void process. If any Ct of Record is guilty of corrupt practices (as imprisonment thro' malice), a Judge is not liable to an action, if he acts judicially and doesn't transgress his authority i.e. don't go beyond the Law. As where a Ct having cognizance of a given offence, sentences one to imprisonment with or w/o bail and even from professed malice. 2 B et P. 326. Falk 396. Corp. 172. 1 T R 503. 534. 537. 2 B et P. 1141. See "Mal Proc" 32.

A Judge of a Ct of Record of general Jurisdiction it seems, is not liable for any Judicial act, as done thro' mistake or malice, if he confine himself to his proper Jurisdiction Post 32. 1 T R 503. 534. 537. 8. 543. 573. 4. 2. B et P. 1141. No proof in this case is admitted w/o this "vehement and violent presumption" in favour of the Judges integrity. He is answerable only to the Sovereign or government. He may be removed from office by the mode provided for by the Constitution or Laws of the State. To any criminal prosecution w/o himself for his abusing authority, tis a decisive answer that he acted as a Judge of a Ct of Record.

The Reasons are 1st Such an exemption from liability must exist somewhere, in every regular government. There must be some rank of office in wh^{ch} Law reposes a perfect confidence, in wh^{ch} there can be none higher. There is a same confidence or presumption of integrity in a Ct complained of, as in the Ct applied to for redress. 2^d The impolicy of

holding such to answerable to Individuals.

But it seems if a Ct of Record of general Jurisdiction has not jurisdiction of y subjectmatter of the process. when an arrest is made, y Judges are liable, for here they dont and cant act Judicially or officially. As Eng Ct of B R awards a criminal Capias on an Indictment, or sentences to imprisonment upon such a prosecution or y Ct of B R awards Est. for the recovery of land in a Real action.

On the last case the Judges wd be liable for y Def in y Est. 10 Co 76. C. 1 Hawk 58. 86.

But if they have Jurisdiction of y subject and in their proceeding transgress their authority. They are not liable. it seems. 10 Co 76. b. 2 BB 1145.

Salk 390. As awarding a Capias vs a person in a Civil suit case Inflicting a higher punishment inflicting a higher punishment than y Law warrants. ut ante. 6 TR 412. 2 BB R 1145. Salk 396. For 393. Cb 331. 8 C 114.

Aliter if they dont exceed their authority, tho' act illegally. or unjustly. As if they wrongfully decide a Question of Law tho' mistake or ignorance. Where the question is properly before ym they have authority to decide 2 BB R 1145.

They are not liable for malicious acts. if they dont exceed their authority, they being of Record. Cb 326. Salk 390.

By a Ctr exceeding its Jurisdiction, as to subjectmatter, is meant, its deciding or acting upon a case or question, on wch it has no Legal right to decide

or act at all. As the Ct of B R deciding a Real action or C B trying an Indictment.

By exceeding its authority merely is meant, its exercising some power, wh^{ch} the Law don't authorize upon a case or Question, upon wh^{ch} it has a Lawful right to act or wh^{ch} is cognizable by it As C B awarding a Habeas vs a Peer Peer in an action of debt Covent &c. of wh^{ch} they have Cognizance.

Cts not of Record (as Justices of Peace in Eng) are liable at C Law not only for malicious wrongs but for any mistake of Judgmt. by wh^{ch} a party is injured. 1140. 10 C. 288. 394. 10 B L 354. 1 S R 300. C B 339. 1 Burr 595. see 2 B L L 1140. Post 14.

- 4- But the injury is mitigated by Several It^{ms} C B 338. The Ct of B R won't grant an information vs a Justice who seems to have acted rightfully. 1 S R 653.

In Count Justices of y Peace are Cts of Record. Cts wh^{ch} can fine and imprison, are said to be Cts of Record. 1d Ray 467. Talk 200. Earth 491. 3 B L 245. 12 Mod 386. 3 Lev 200. Demed to be universally true. 2 B L 468.

A how^{se} to w^hose process of arrest, is a power to imprison. 3 B L 20.

5. As to Arrest of Persons not liable to Arrest. Arresting C^{or} or adm^t for y debts of y Testator or Intestate. Is unlawful ni upon a suggestion of devastavit. Note a Devastant subjects him personally. 12. in his individual capacity. C B 326. 3 Mil 368. 2 B L L 1192.

False imprisonment lies in this case vs the atty.
as well as the original Plff. (Ibid) and y rule
is general. Mal an atty who is instrumental in
causing an illegal arrest is liable as well as
well as his Principal 3 Mod 345. 77. 2 BB R. 1102.

Exemptions from arrest are sometimes connected
with the y character of y Individual as (Ex Sub)
Sometimes it arises from temporary circumstances
or particular privileges As attendant on Ct as
a Suitor or witness exempt from arrest on
civil process. 4 Com 475. 2 Bl R. 1142. 1113. 4 JR. 377.
5 Bac. 871. Cro J. 379. Doug 649. 52. 4 Bac 222.
2 Role 273. 1 HL BB. 536.

In y latter case y arrest wint illegal in y first
instance but a Supersedeas issues. Ibid 8. JR. 534.
4 Ibid 377. after wh detention is illegal and
an action lies. The privilege of a Suitor or witness
extends to his money, horse, necessaries. 4 Bac
222. 2 Role 273. 5 Bac 171. 4 Ibid 584. 5. Tit 236.
5 Co 52. b. Coup 9. Cro J. 379. 3 Bull. 97. Doug. 652.
What is said by Justice Bull Doug. 652.
must relate to an action after y Supersedeas.
as for Prior detention in case of a Peer.

In Comt a writ of protection is commonly b.
obtained in ^{these} cases. before hand. i.e. before y
time of attendance — This operates as a Supersedeas
does in England. Arresting therefore one thus
protected, is therefore False imprisonment, but not
till y protection is shown.

The writ however in these cases is good and y
suit continues 1 Keb 220. 2 BB R. 1193. The only
effect of y privilege is, yt y person or Suitor
or witness is discharged.

Privilege of suit is disallowed in case of collusion
 So as to y Plt in vexatious suits or actions.
 it being discretionary with y Ct to allow it or
 not. 2 Bl R 1193. 11 Mod 79. Corp 9. 1 H Bl. 636

So where a party attends a Ct as volunteer - upon
 pretence of answering process, when there is none.
 Salk. 544.

A party attending arbitration under rule of Ct
 comes within y Exemption For y arbitrator acts
 under rule of Ct or order of Ct and in some
 measure represents it. Indeed the arbitration
 is a species of Ct. recognized and regulated
 by Law. 3 East 89. Pea Evi 193.4.

For arresting a Peer or certificated Bankrupt,
 y officer is not liable, he is bound to obey y
 Writ. The Party may be liable in "case"
 For if y act of arresting is not a Trespass
 y party cannot be liable in that form, (it is
 Trespass) but for making a wrongful use
 of lawful process. Doug. 646. 58. 10 Co. 70. b. & 2 JR.
 231. Esp. 530. "Mal Pross" 31-

So members of congress are privileged in
 going, attending &c. So members of our State
 Legislature. So electors going to a meeting of
 Electors appointed by Law. On none of these cases
 D. G. trusts is the arrest actionable - nor y privilege
 in y party has the Ev of his privilege with
 him at y times.

7. Gaolers detaining a prisoner for prison fees (tho
 entitled to a discharge) is not false Imprisonment.
 5 Bac 171. 2 Inst 63. 53. n 33. Aliter as to Board
 Post 158. This is matter of private contract between
 y Gaoler and Prisoner. y gaoler trusts to y

personal credit of y Prisoner, if he have no other security. At any rate there is no Lien for board. on the person of y Prisoner 1 Vent 237 1 Pow. C 173. Plow 68. 1 Mod 132.

If y order of y Co to confine one in a certain prison, confining him in any other, is false Imprisonment. His confinement without lawful authority. Hob 202. 1 Sid 318. Lach 16. 5 Bac 171. Talk 408. 5 Mod 295. 3 Talk 219. Sheriffs De 4.

A peace officer is warranted or justified in arresting without Warrant on a reasonable charge of felony. And no felony is committed. It is his duty to arrest on reasonable suspicion. Doug 334. 43. 4 Bac 317 Pl 73. 1 Role 43.

Aliter of a private person. But if a Felony has been actually committed, a private person suspecting another to be guilty on reasonable ground & without malice, and liable for arresting without Warrant. to carry before a Magistrate - Esp 334. J. 5 Bac 171. Doug 345. Root 66.

Seems if no felony has been committed, for he and like a peace officer bound to act and therefore not justified to y same extent. As to prevent a Breach of Peace, or an escape escapes Any persons may arrest for such a purpose without Warrant. 1 Bul 158. 2 Hawk 82. Doug 245. Esp 334.

An original arrest on Sunday in civil cases being void by 8. 29. Car 1. & St Comm 370. is false imprisonment. Esp 317. 605. 5 Mod 35. Talk 78. 2 Swift 111. 4 Bac 416. 1 LR. 265. 2 RR. 1195. 8.

Such an arrest wd have been good at Law.
2 Br R 1195. 2 Buls 172.

Bent. Special Bail may take their Principal
on Sunday, for his in y nature of a Goaler.
y Principal as of an Prisoner, and y taking y Bail
is as retaking on an Escape. Such an arrest (or
an Escape) is lawful & no Escape Warrant can
be necessary, if the arrest is by that Prisoner
who had y previous custody of y Escaper. Talk
626. 3 Talk 145. Esp 605. Que. 2 Br R. 1273.

Aliter as to Bail to y Shff. 2 Br R. 1273.
y right is not deemed necessary. I suppose
constant custody on meane Process. not being
required.

an arrest in civil case by breaking y out-door,
of y defts house, is false imprisonment - 5 Co 93. Comp 1.
1 Hob 62. 2 Bac 267.

Issue of an Inner door 2 Mod Cr. 484.
Intrance here pages 10. 11. Shff and Goaler where
y matter is fully considered.

It has been questioned an an arrest illegally
made by breaking y house, y Cost of y process
is good, and y only remedy by action (so ruled,
5 Co 92. 6. 5 Mass. 155) or an the Cost of y process
is void and may be set aside in a summary
way, by discharging the Person arrested. Comp. 1. 9.
Esp 614. 1. Crs E. 908. Kel 389.

9. It is now decided that the Cost of y process void
and y officer a trespasser - 2 Br R. 233. Ruled in
case of property taking by breaking a door and
y Cost set aside - 2 Bac 367. + 2 Bac 454.
2 Lev 285. 6. Contra 5 Co 93.

But y interposition of y Co on motion to be discharged is discretionary - Corp. l. 9.

In these cases (of arrest by breaking y house) false imprisonment lies. It is y knowledge of y party and y arrest ab initio is illegal - H. l. 52. Corp. l. 9.

It has also been questioned an if an illegal arrest be made in consequence of yk another arrest is made, wh wa secus be valid, y latter is valid - tu valid ni there be collusion. Tent. Ibid see Sh. ff. 9. 11.

In Court. it has been decided, yt an officer by his Escape. Warrant. may retake his prisoner in another state (Root 107. practice 84) But y Warrant is of no use ni as a convenient Evi of a right to take, it being strictly a process, wh cannot run out of y State. where issued. The decision. B. G. consider as good on another ground, for wtht y Mit. y officer having a Lien on his person. (1C of the Justice) it wa entitle him to make the arrest any where. This such Lien was created under a Law of Court. for it can make no difference under which what law such Lien was created.

As to Bailpiece from another state see 5 E. b. 172. n. 7. John. 145. If an officer by mistake arrest B 10 instead of A (1C on a process vs A) he is liable for false imprisonment So even if B declared himself to be A. Quere Doug 42. 2 Role 552. pl 3. E. b. 328. 3 Com. 490. 3. 2 Role. 552. Moor 457 Hara 323.

In such cases y mistakes won't excuse, but it will go far in mitigation of damages. E. b. 328.

But can the above Rule be Law? Tent B. see 2d Ray. 177. y procuring and faulty cause of his own arrest.

Talk. 642. "Battery" 16.

An arrest affecting deft's body on mesne or final process in civil cases when satis personal property is tendered, is false imprisonment. 1 Root 128.

2 Lev. 191. for y process is vs both. By Court St Law 58. *vid* Bac 171.

Any person has a right to arrest another who is fighting and to restrain him till his passion is over. 5 Bac 171. 1 Stark 136. 2 *ibid* 81.

Some Coverts ^{are} liable to be sued in some cases with their husbands. cannot in general be held under arrest under Mesne Process.

2 Str 1272. 1 TR 486. 1 B R 720. 1192. But there is no instance of false imprisonment but in those cases. Doug 648. argues. Talk. 115. 2 H Bl 117.

Mr B G. Annot will it lie. For they are liable to arrest in such cases for y purpose of having common bail entered, or till y husband gives Bail for both. They are then entitled to be discharged. 2 B R. 1193. 4 Doug. 648.

Arresting and confining one for a short time under a parol warrant from a Justice for examination is not illegal. 5 Bac 172. Root 160. Mod 408. Cro E 829.

A private person without warrant may confine a person disordered in mind & who seems disposed to do mischief. 5 Bac 172.

As to Liability of Officers - Breaching process

If an officer under the authority of a Ct of limited Jurisdiction make an arrest on a process from y ^{Justice} ~~Justice~~ of wh. it appears y Ct issuing it. had no lawful Jurisdiction. he is according to some of y authorities

Ex 391. Bal 82.3. Harv 480) from whatever cause
 y defect of Jurisdiction arises 18. in y want of
 Jurisdiction goes to y subjectmatter or arises out
 of some personal privilege of the def. not to be
 sued in the Ct. to wh he. or from y cause of
 y action arising out of y Ct's Limits. La Ray.
 2130. 1 Contr. (But the rule applies (to this
 extent) only to Ct of limited Jurisdiction.
 10 Ex 76. b. 5 Ex 54. a. 3 Mil 34. d. "Post 12" Aliter
 in y 2 last cases. if y Ct is of record of general
 Jurisdiction - "Post 12"

But y Rule has been extended much further. Thus
 in y Marshal sea case (it was holden aliter, with
 any regard to y defects appearing in y face of y
 process or not.) yet in a case like y above y
 officer wd be liable. 10 Ex 76. 7. Co J 337. See y decision
 and reasoning in the Marshal sea case. Reasoning
 contradicted in La Ray 230. Str 710. 993. 589. Case
 is again supported 2 Mil 385. S. C. Ex 398. 9.

As a city Shff. executing a City Ct process.
 where y cause of action didnt arise within y City.
 but this fact not appearing upon the process, wd ^{Shff}
 be liable.

But this Rule seems not to be Law for if it
 were y consequences wd follow Sup. a Ct of
 limited Jurisdiction to issue a process upon a
 cause of action wh from y face of y writ appear
 to have arisen within its Jurisdiction. when in
 fact it didnt, y service of this process wd
 subject y Shff for false imprisonment, he has no
 means of ascertaining, no reason to suspect y
 cause is not within the Jurisdiction of y Ct.
 & as he is bound by the Law to serve the process,
 how can he ^{can} avoid subjecting himself. Mr Justice
 Holt in a remark on this subject says. "y said

resolution, y Marshall's case, is a hard case resolution."
 I think y latter rule wd be adopted.

12. The decision in y "Marshall case" was merely
 when y Ct issuing the process had no Jurisdiction
 of the subjectmatter, every thing done under it
 is absolutely void, an it appears or not on
 y face of it I y officer liable. This seems
 still to be considered as Law in Eng. Ck 381.

Bul 82.3. 1 Vent 333. 4 Coub 172. Str 718. Quere
 2 RR. 653.4.

But by other opinions, where y Ct, tho of
 limited Jurisdiction, has jurisdiction of y subject
 matter and y defect of y Jurisdiction is from
 something local or personal. y officer is justified
 in y defect appear upon y face of y Precept
 process. This appear to B.C. to be more correct
 tho opposed to the last rule in Reg. 11. Aliter
 if it so appears. As the City Ct. do issue
 process upon y face of wh. y cause of action
 appear to have arisen out of its Jurisdiction.
 Coub 20.5. 5 Bac 170. 2 Mod 29. 106. 1 Vent 369.
 Bac 82.3. Coub 274. 3 Bac. 233. Ck 391.
 Stara 480. Str 710. 10 Co 76. b. 6 Co 54. a.
 as to y case of Com Pleas: 3 Mil 345. Ck 329.
 2 Keb 705. 844. 3 Keb 213. 6 Co 54. a.

According to La Ray 230. he is not liable, tho
 y defect don't appear upon y face of y process.
 and y Defor and y original def is fully protected
 as to y officer by pleading y defect, and if he
 does not, he waives it. See Quere an this is
 Law in Eng. (Semb not Best 13")

An officer may justify under process of a Ct. of
 Prestm. tho' y writ be void, viz when the Ct
 has not jurisdiction of y subject matter. 10 Co 76. b.
 6 Co 52. a. 3 Nils 340. As where such a Ct
 issues process returnable to a remote term.
 (or other regularity) he wd be justified in
 making the arrest under it, yet in this case,
 tis void upon y face of it. and y Plt is liable
 for false Imprisonmt (Post 14) y high authority
 of these Cts justify him. So if he arrests a
 Peer. under a Civil Capias from a Ct or any
 atty of another Sub Ct.

It has been resolved in Court yt an officer 13
 is justified by his process in all cases, viz y
 process is void upon y face of it, even tho' there
 is a defect of Jurisdiction as to y subject matter.
 12 Rib 110. 82. 2 The Nally 488. 3 Nils 345. Post 15.

In some cases process is void and y party and
 as y case may be. y Ct. is liable for an arrest
 under it, where y Jurisdiction of y Ct over y cause
 is complete, as to the subject matter person and place.

I In cases of limited Jurisdiction where an
 authority given by It is not strictly pursued,
 Eb 331. 7. 8 Co. 1114. Talk 408. 1 Str 710) see their
 authorities for Ex^{tr} as where a Justice committed
 y Plt for killing game: tho' he had satis effects
 to answer y penalty, y Justice was held liable
 for he exceeded his authority (ante 3.) and y
 offr is excused. But y illegality of y warrant
 waunt Patent. and the jurisdiction was complete.
 1 Nils 153. Eb 332. P. C.

To the Commissioners of a Bankrupt, for any
commitment not warranted by the powers. 1033.
2 Bl R 1035. 1041.

2^d So in other cases y process of any Ct. even y Ct
of Westminster may be void independly of any
question of Jurisdiction for irregularity (for
irregularity renders any process void) & y Plff
in y process is liable to this action (ante 12)
Is he liable before y proceeding is set aside?
(See next page) As a capias returnable to y
next term, but one to that of the Teste.
1033. 9. 3 Com 491. 3 Mills 341. 2 Bl R. 845.
Salk 700. 1 Root 310.

The officer is not liable in this case, if y process
is from y Ct of Westminster, and tho' y irregularity appears
on y face of it. 3 Mills 340.

But if an officer execute any irregular process
of any Ct, after it has been set aside for irregularity
he is liable in Trespass. Semb. For he don't then
act under the authority of y Ct 1 R 73. 2 Bl R. 840
3 East 148. 1 Sid 120. Str 509. 15. East 612. 5. n.
1033. 1 Mills 340. See also if he execute it before
he has notice of its being set aside.

15. So tho' y original arrest were lawful, yet for
any subsequent oppression, this action lies vs y officer
or magistrate, if he is not in fault.

As a wanton cruelty in confining in dungeon
without air &c. 1033. and cases cited 1 R. 536.
The Jurisdiction of y Magistrate was also Special.

General Rule. An arrest under an irregular
process is void. Tho' y Jurisdiction was complete.
So under process of arrest founded on an
irregular proceeding As an arrest on an Ex

issued in Judgment set aside for irregularity Ekb 320
391. 3 East 125. 1 Str 579 Ray 73. 1 Lev. 95. 1 Sid 272.
1 Miles 155. 345. 2 Str 993.4.

But tho' y officer inventing an irregular process,
(of a superior Ct & G outboses) before tis set aside,
is not liable, tho' it be host set aside. Ekb 391.

See Ray 73. and y cases cited with it in y
last page. There. Is it sued by an Inferior Ct
(and irregular upon y face of it) ?

After tis set aside, y Pltff in it is liable, and
semble in Trespass. Ibid Sed Quere. sed quere
as to y form of action. 1 Sid 271. 2 Ekb 391. 1 Lev 95.
15 East 615.

But an arrest on an erroneous process
(y Jurisdiction being complete) is good. 4 Bac 450.

Str 559. 710 3 Miles 345. Ekb 391. Therefore y
party as well as y officers may justify under
erroneous process, till it be reversed. 3 Miles 345.
18. he may Justify in Trespass. all acts done
under it before it was reversed, tis good, till
reversed. 2 TR 231. 7 R 455. 3 Bac 333. 2 Mcmally 488.9.

Recapitulation of the General distinctions.

as to y officers liability, by y Eng. Law. sh appears
most reasonable. The Rule seems in Eng. to be kate
to all the authorities. - 1st That when y subject
matter is out of y Ct's Jurisdiction (where the
Jurisdiction is General or Limited) y officer is
liable, tho' y defect don't appear on y face
of y process. "Shff. 13"

2^d When y want of Jurisdiction is as to person
or place, yn y officer is not liable, ni it appears
from y face of y process. But as to this the opinions
are contradictory.

2^d Nor then in case of process of Ct of Necton -
 4th. But the second. tho true as to the same Process,
 applies not. it is said, a final process issued
 in an Ct. is when the arrest is under process
 of Inf. Ct. & officer's justification must show y^e
 cause arose within the Jurisdiction or at least
 y^e it was so laid. Post 18. It is not enough,
 y^e y defect did not appear from the Process. But
 83. Comp 20. There y reason? Because y
 record will furnish y means of knowing?
 Is this sufficient reason?

5th If process of a Ct of limited Jurisdiction
 is void for irregularity where y Jurisdiction is
 complete in all respects, y officer is liable
 if y defect is apparent. Otherwise not. I
 conceive. The process of a Sup Ct of Necton.
 justifies y officer in both cases, altho as to y
 Plt^f in the Process.

6th Process merely erroneous always justifies
 all acts done under it before Reversal.

But tho y process from a limited Jurisdiction
 may justify y officer according to y foregoing
 distinctions. (tho y Jurisdiction be not complete
 as to y person or place) it does not y original
 Plt^f. He is bound to know the extent of y Ct
 Jurisdiction, and to show it, and where y cause
 of action arose. Cro J. 34. 'Post Mal Profr^m. 37'

And the original Def (now y Plt^f) is not barred
 by having pleaded to y first action. - Est 330.
 But 83. 5 Bac 170. 1 Vent. 369. 2 East. 260. 2 Mod
 196. 7. In La Ray 230. it is denied that even
 y original Plt^f is liable in this case. Latwick
 937. 108. 1 Vent 236. are cited see Comp. 20.
 La Ray 230. approved on this point in Comm.

by La Ellenworth Kirby III.

Process has been held irregular and void, when
 filed up with proper authority as where in Co
 or Co. left a Blank for the atty to fill with
 y name of y Bailif Cb 339. 2 Wils 47. 16.

The Person sued here was y person serving y
 process. it dont appear that he knew of y Irregularity,
 however y process here was without any legal authority,
 y same in law as if forged. Hence y officer wd
 be liable. I G trusts. an y defect was apparent
 or not.

So where y process had issued informally "as
 this where y Pltff was arrested by Process
 out of y Vice Chancelor Ct of Oxford. Ca Ct
 having authority to issue process only in cases
 where y Original Pltff makes oath of his cause
 of his action and that he believes that y Def will
 abscond) when y original Pltff swore only yt
 he suspected yt the Def (y Present Pltff) was
 run away. Cb 329. Str 993. The party and
 Ct officer & goaler were held liable, all
 joining in one Plea. Strange adds that y
 officer and Goaler, by not joining in the
 plea, with the Ct. and Pltff might have
 Justified as acting under Process This is
 in 2 Wils. 385. and y whole said to be "coram
 non Iudice" as the Ct had only a conditional
 Jurisdiction of y subject matter and y contingency
 conferring y Jurisdiction, had not happened
 in this last case. I G concurs.

17.

So where y writ is not returnable on a day certain it is irregular. *Est* 330. *Pro* 314. *Dyer* 262. b. *pl* 33. 2 *Bull.* 36. 1 *Mod.* 81. As at y next Ct of the "Manhal Sea" In this case y irregularity wd appear. Therefore y officer as well as y Party, is liable on principle. *Contra* *L.R.* 2304. *Secus* if issued by a Ct of Westminster. (ante 12) But y case has been denied, and next Ct held sufficient. 2. *Mod* 58. *Cow* 212. The Rule however is clearly law, as if no manner day were appointed in any manner.

But this last Rule applies only to Mesne Process for y time of returning final process, doesn't concern the Def. The proceedings in the suit are at an end: y *Est* doesn't like Mesne Process require y appearance of y Def. at Ct nor any other act of him. *Coup* 21.

Arrest under general Search warrants are illegal. So are general Warrants of any kind. As a warrant to arrest y author of a Libel, "Whoever they are" *Est* 399. 1 *Hale* p. 450. 2 *Mil* 275. *Stirby* 213.

The Requisites of a Search Warrant are 1.st yt it be granted on oath of y Party complaining.
2.^d That y grounds of Suspicion be declared.
3.^d That it be executed in the daytime by a known officer, and in presence of y Informer.
4.th That it be directed to a particular place, or to a particular person in whose house &c.

18.

When y requisites are observed, y Informer is justified or not, by the event of the Search. *Est* 399. 2 *Mil* 291. 2.
When not observed, he is of course liable in

any event. The officer, in J.G.'s opinion is not liable in any event, if y all y Requisites are observed, whatever y Covents may be.

When an officer justifies, proof yt he acted as an officer is sufficient as to y fact of his being one. 12. prima facie so. he is not bound to show his appointment. This may be rebutted. Per 1005. 3 J.R. 632. 4 Ibid 366. 2 Mc Kally. 485.

When an officer serving process justifies under it, he need shew only y ^{arrest} ~~event~~ or process itself. ^{named} ~~that~~ is restrained of mesne process and y return day has returned, arrived. Cb 333. 7. 6 Co 52. 2 Roll. 563. and that is restrained of mesne process and y return day has returned, arrived. Cb 337. 2 Str 1184. Brad Coup 20. ante 13. But y necessity of y officer making a return, obtains only in a case of Mesne Process. Coup. 20. 5 Co 96. a. 67. a. 1 Mil 17.

And an Under Shff. is not obliged to show it in any cases. it is not in his power. By the Com Law. he is not returning officer. he has no such authority, and tho in fact he serves y Process, y Shff enters it and makes y Return in his own name.

But if y original Plt is Def. he must show a Indgmt as well as Cb in case of final process for the Indgmt may have been reversed before the arrest. and y (original) Plt ought to take notice of it Cb 333. 4. Talk 408. 9.

The same Rule obtains when y action is not a third person who procures y service of Process from another. See if he acted in aid of y officer & at his request. In y former case he takes y place of y Plff in y Process, in y latter he is protected by y officer's authority. Salk 408.9.

If a Plff having made an arrest and does not return y Writ, when he ought to do it, he may be Trespasser, "at initio" This is mere omission for want of return. y Writ is not Cur. y Justification cannot thus appear. (Action of Trespass for Injuries to personal property) 5 Com D 581. 2 Roll 263. 3 Bac 102. Salk 409. La May 632.

It seems then hardly correct to apply y doctrine of Relation, as the arrest itself cannot appear to be Lawful.

If y original Plff and officer are sued together they may sever in defending & if they join, and the Plea of Justification is insufficient, for the Plff. (original) it is so for y officer. Co 336. Str 993. 579. 1184.

So e "converso" if y Plea is not good for y officer and wa be for the original Plff, he loses his defence, by joining. As officer don't show y return of y Process, &c. when he ought to do it. It is better then for y officer to defend for himself, for if he embarks on y same plank with y original Plff, he must sink or swim with him. Co 336. Str 1184. Mil, 817.

Procuring, commanding, aiding or assisting, makes
 one a Trespasser. and a Principal Co Litt 57. a.
 1 Talk 409. 2 Han 372
 Hawk.

A servant keeping the key of a Room. knowing
 that one is imprisoned in it, is guilty of
 False Imprisonment. 3 Mils 377. 5 Com. 579.
 Co Litt 57. a.

Procuring even a Sovereign thro' fear 20.
 unlawfully to imprison one is False Imprisonment.
 in y procurer. 2 B R. 983. 1050.

Finis

Malicious Prosecution

This action is to recover damages, vs one who has preferred an Indictment or other prosecution or brought an action vs the Pltff maliciously and without any ground or probable cause. 5 T B. 116. Esp 323. 27 8.

1 Bac 61. Any wicked or unlawful motive is malice.

It is analogous to the old action of conspiracy, which is now much out of use. Conspiracy lies only vs two or more, for having falsely and maliciously prosecuted a Pltff for Treason or Felony and thus endangered his life. 1 Saund 330. n. a. Finch Law. 305.

3 Bb 126. 2 Bull. 271. 1 Saund 230. Esp. 5311. 1 Com 158. See Ray 379

Another analogous action is the action on the case in the nature of conspiracy. It lies where 2 or more conspire to prosecute another maliciously and without cause, or otherwise conspire to injure him in person, fame or property Finch L. 305. Talk 14. Esp 330. 1 Bac 61. 1 Saund 230. n.

The gravamen in the action of malicious Prosecution resembles in some measure that of Slander. It is not necessarily generally a personal danger to the Pltff, but the vexation, expense and scandal. 3 Bb 127. 10 Mod 219. 20. 16 69. Talk 13. 14.

The action of conspiracy lies not in y^e P^lt^f has been actually prosecuted and acquitted, for are y^e words of y^e writ. E^b 377.8. 12 Co 23.a. Cro B.8. 1 Roll 112. F. N. B. 114. 118. 260. 1 Mil^s 211. E^b 330. 1 Camb 161.

Indictment for conspiracy lies when there has been an unlawful conspiracy. as above tho^t nothing is executed. 2 Lev 57. 9 Co 56. b. E^b 330.

To action on y^e case in y^e nature of conspiracy, lies, tho^t no Indictment &c has been actually exhibited 1 Bac 61. 1 Roll 112. 1 Bl 158. or 235. 12. I suppose by charging a crime for Conspiracy an injury to reputation.

Further difference between y^e action of conspiracy & y^e action on the case, in nature of conspiracy In the former if all but one are acquitted, Indgmt cannot go vs him. In y^e latter it may go vs one only. E^b 330. La Ray 379. 1 Bl 159. Bul 14. 1 Mil^s 200. 2 Lev 52. 1 Roll 111. 12. Pl. 5. T Rayma. 176. 5 Mod 408. 8 6 ibid 169 Cro Ch. 239.

The first is a writ in y^e Register. 1 Mil^s 211. F. N. B. 260. the latter a Special action on y^e case. In y^e former y^e gist is y^e personal danger to wh^o y^e conspiracy exposed y^e P^lt^f. In y^e latter tis a consequen^t damage and scandal. P^l Carth 4. p. 3 386 126. Bul 14. 10 Mod 219. For 691. 1 Taun 230. n. 2. In cases for malicious prosecution, y^e gist is y^e same as in y^e latter action.

Action in y case is in y nature of Conspiracy
is substantially an action for malicious prosecution,
with this difference, yt y later may be b^ot, w one,
no other being concerned, y former must be b^ot
w two or more, or w one charging that he, with
another or with others, had conspired &c. & that
to found y action, y wrong must have been
committed by two or more. 1 CB 150.

The ground of y 2 actions are therefore y same.
Esp 531. 2 Lev. 52. Cro Ch. 173. u 239. Miles, vs Miles
1 Miles 216. 1 Saund 230 a. Ray 176. 5 Mod 408.
Bul 14. and tho² are sued, judgmt may be w
one only. in both cases. Ibid.

Action of conspiracy or y case in nature of
Conspiracy, and for malicious prosecution, are all
unknown, tis said at C Law. 3 Hs Reeve En Law 58.
The first originated in the reign of Edw. II. formed
by his direction, but sanctioned by Parliament.
2 Reeve Hs Eng Law. 239. 328. 3 ibid 127.
The 2 latter are derived, I suppose from y Equity
of the St of Mstm. 2^d. 2 Lev 20.

As to Mit of conspiracy see contract. Bull 14.
Earle 416.

Tis essential to y support of y action for
malicious prosecution, yt malice and want
of probable cause in y former prosecution shd
have concurred. Falsity alone ant later.
Bul 14. Esp 520. 4 Burr 1971. 150 544.5.

It lies ergo on one, who maliciously promotes a false prosecution or another knowing y charges to be false, or having no reasonable ground to believe them true. But it is always sufficient for the Def to show probable cause, an he acted with malice or not. Bail 14. Ck 533. Cro E 900. 1.

Probable cause is a complete Justification. Otherwise every unsuccessful Plff or prosecutor might be subjected in his action.

In Count when y action is for false and malicious civil Suit. it is called an action for a rescationis Law suit.

I. of Criminal Prosecutions false. Malicious, &c.

1. If a man is false & indicted for crimes yt wa injure his reputation. he may have this action. 1 Pil 10. Gely 46. Talk 14.

2 So if y charge exposes to danger his life or liberty. Talk 115.

3^d So an Indictmt false & subjecting to Expence only is sufficient to support y action. La Ray 378. Talk 15. arg² Str 378. Ck 528. Str 977. As Kurlana sues alone for expence incurred for y or an a malicious broo² vs his wife & action lies.

Danger to his life or liberty, 1st of y Plff. is not necessary to found y action. Thus y Indictmt having been ill, so yt y Plff was in no danger

of a conviction is no answer to y action, if y charge
inquires his reputation &c. *ut sup.* Ep 328. 4 VR. 248.
3 B&C. 127. Fulk 15. 1 Bac 61.

Scandal is sufficient, tho vexation & expence are
also regularly suffered in such case.

So if y Indictmt in y last case has been bitt, or not
found by the Grand Jury, yet y action lies for
y vexation, expence, scandal. *Id* Ep. 328. Cro. J. 490.
Fulk 14.

As where y Grand Jury has found "not a true
Bill"

So expence alone caused by Insufficient indictment
will support y action. An Indictmt false &c is
for exercising a trade without licence, tho y
reputation of y party ant injured nor his
personal security endangered. Fulk 15. (Marg.
3 B&C 127. 10 Mod 548. 214. 5 ibid 25. 93. 127. 1 Bac 61.
Ep 328. 2 Str 977. Fulk 14. 15. Cont

Public officers however commencing prosecutions
on false information are not liable, but y person
giving the false information, knowing it to be false,
or with malice and without probable cause,
is liable. 1 Leon. 187. Cro C 130. 2 VR 231. 1 Bac 61.

Is y duty of such officers to prosecute on Information
apparently credible. The Law of course justifies ym
in such cases.

But if y public officer in y last case is y
magistrate granting y warrant and y gravamen

is, *yt* y Pltff was arrested under it. The *fact*
and not *Case* is y proper action or remedy. And
in this respect, y case in Cro E 130. is denied. 2 TR 231.
E 530. (see Doug 650. False Imprisonment b., for
he is regarded as y immediate, not y remote
cause, of y arrest. (as informers are) y Constables
or Pltff being but an Instrument, or he is bound
to execute y process.

This action lies not, till y malicious prosecution
is at an end. 9 Lev 56. Hob 267. Doug 205. 10 Mod
209. 1 St 114. 2 TR 231.

Otherwise y Pltff might recover as for malicious
groundless prosecution, and afterwards be convicted
upon it.

Hence it must always appear from y declⁿ
yt y Prosecution for wh. *de.* is in some way at
an end. In Conspiracy, "legitimo modo acquittatus"
is necessary. Not so in this action. 9 Co 56. b.
Doug. 205. 10 Mod 209. 2 TR. 231. Hob 267. 1 St 114.

Pltff was discharged from prison and satisfaction.

But y omission to show *yt* y prosecution is at an
end. is cured by verdict. 1. Saund 228. E 532.

The mode in wh y original prosecution was
terminated must also be stated in y declⁿ
and correctly stated. If wrongfully alleged,
there will be a variance.

As an allegation *yt* y Pltff was acquitted on
y original prosecution is not supported by Evi of

If a "Not Proh." for y is not acquittal. Bul 34
 Ch 336. Talk 21. 5 mod 261

The declaration states all y proceedings in y original
 prosecution and any misrecital in a material part
 of y Indictment is false. a fatal Ep 332. 3.
 + 1 RR 430. As a variance bet^m y original record
 & declⁿ or as to y day of acquittal. 5 mod 216.

Seems if it is not an immaterial part Ep 332.
 2 BB R 1050.

No Civil action lies vs Judges of Record. Justor
 or Grand Juror. for even malicious acts. done
 in the regular exercise of their Judicial power.

1 BB 156. Ch. 635. 1 RR 583. 13. 574. 34. 5. 337. t.
 1 Plunk 191. 2 Perre His Eng Law 328. 2 BB R 1141.
 12 Co 23. 4. 2 Mod 219. Cr. E 130. False Imprisonment.
 Cowd 61. 172

This is a Rule of public policy to guard their Independence
 in Judging and to protect them in execution. The legal
 presumption of their integrity cannot be rebutted or questioned
 in a Ct of Justice. It is as strong as yt of y integrity
 of any Tribunal. As a Judge of Record always
 punishnt on an insufficient Indictment. a Jury on an
 insufficient Evi or vs evi. No Civil Remedy.

Malice may be generally inferred from y want of
 probable cause. 4th Bun 1974. But want of probable cause
 cannot be infered from the most Express malice.
 1 RR 544. Ep 322. for if no ^{probable} cause appear
 in proof. it must be presumed. yt y prosecutor had
 none. and of course that he acted maliciously.
 But "e contra" probable cause, or even actual cause.
 may be prosecuted from a malicious motive

and y Law justifies y Prosecutor in both cases,
for where y act is right, y Law never enquires
into motives. But y P^lff is at liberty to prove
actual malice. — always & advantageously.

To prove malice P^lff may give ⁱⁿ P^{ri} collateral
circumstances as an advertisement by the Def^y &
y ad^{re}malme was found. Malicious de^{tt} or a
30 E. 535 E. 691. In short any P^{ri} of malice
is any wh concedes to prove it.

Conviction of y P^lff in y original prosecution is by
a competent Jurisdiction is not only P^{ri} but conclusive
P^{ri} of probable cause. Exp 529. 1 Mils 232. Hob 267.
6 Mils 202. It of course a decisive Bar of y action.
for to deny probable cause in this case, case
wd be to impugn the Record of y conviction.

Acquittal is in most cases, but not always
presumptive, but never more yn presumptive Evi
of y want of probable cause. Not conclusive,
because it may have been obtained from y absence
of proof, in y case of actual guilt, or from a
want of proof sufficient for conviction, tho'
there was satis to show probable cause. But
being presumptive Evi it throws y "onus" on y Def.
to prove a probable cause in most cases. Exp 520.
1 Mils 232.

To Acquittal even on a defect in y original
process is generally presumptive Evi of want
of probable cause. 4 TR 247. Salk 15. Pl 5.
Quere an Ignoramus found is prima facie Evi

of want of probable cause?

Acquittal not always *prima facie* ^{want of} *evi* of probable cause. As *Def* & *Pltf* was bound over by a *Ct* of Enquiry or a Bill of Indictment vs him has been found, by a Grand Jury. This is generally *prima facie* *evi* of probable cause and *Def* must lie on the *Pltf*. He acquitted on the Trial.
Ex 536. *Bul* 14. *Salk* 15.

So if it appears from *y* Report of *y* Judge, *yc* there was probable cause. *Bul* 14. *Ex* 529. 36.

Exception. Where *y* facts upon which original prosecution was founded, necessarily lie in *y* knowledge of *y* *Def* himself. He must show probable cause. This *y* grand Jury have found the Indictment *De*. *Bul* 14. *Ex* 536. as prosecution for robbing *y* *Def*.

And proof of *y* *evi* given before *y* Grand Jury (where *y* former prosecution was by Indictment) is good *evi* of probable cause. *Bul* 14. *Ex* 530. 36. 34. 6 *Mod* 216. And *Def*, oath at *y* original Trial as to the existence of *y* crime charged, is admitted, if no other person was present at *y* time. 18. if there is no other *evi* of *y* fact. *E. G.* *supra*, of prosecution for robbing *y* *Def*. This Rule is necessary to *y* protection of *y* Prosecutors, as *Def* may have been *y* only witness of *y* facts, which constitute probable cause.

The Existence of Probable cause in any given case, is a question mixed. Partly of fact, partly of Law. But what amounts to probable cause, is a question of Law merely. I.E. any circumstances, alleged to prove probable cause, exist, is a Question of Fact. But are or are not these circumstances, amount in Law, to probable cause, is a Question of Law. So that if facts being given, the Inference is a conclusion of Law. 1 S.R. 540. 519. Paul 14. E.b. 529.

Therefore regularly Deft pleads should show the facts, I.E. the ground of Suspicion in which he acted. Cro E 134. E.b. 533. "See Pleadings Demurrer Duplicitly"

As it seems necessary for the Def to show that the crime for which he prosecuted, was committed by some one. Thus it seems there can be no probable cause of action. E.b. 534. 6 Mod 216. 2 Hawk 220.

If Def believes his property to be stolen, when it is not. Clinton vs Hopkins, Ct of Errors.

So what amounts to Malice is a Question of Law. 2 Ld Ray. 1493. 1 H.R. 579. cases cited and arg^d 1 Hils 233. I.E. what in Law constitutes malice is a Question of Law. but an malice exists in a certain case, is in the first instance a Mixed Question. "Instruction ^{instruction} as above"

When the action is for malicious prosecution for felony, a copy of the original Record granted by the Ct. in which trial was had, is necessary to enable the Plff to recover and the granting is discretionary. E.b. 534. 1 Bb 580. 1 Bac 61.

Where y crime charged is a Misdemeanor only, such copy aint necessary. Esb 534. 1 Bl R 385. Original produced by Clerk is sufficient. These appear to be the Rules of mere practice. 1 Bac 61.

In y former case it is usual to deny y Copy. If there appears to y Ct in wh yC. yt there was probable cause or ground for y prosecution. Carth 42. 3 Bl 126. Esb. 534.

II When y action lies for a groundless civil suit or a vexatious Law Suit.

General Rule as laid down is yt y action does not lie for bringing a Civil Suit, even tho there is no right of action. because tis a claim of right, Pltff is amenable "for false clamors" at C Law. 10 John. 106. 2 Phil Evi 116. n. and is now liable for Costs. Bul 11. Salk 13. 14. Esb 525. 1 Bet P. 200. wh are recovered by the original Def. - so no damage presumed. Secus for Criminal Prosc.

Exceptions. 1st Where there is good cause of action in favour of one & another having no authority, sues, und arrests y Party liable. y action lies. Esb 525. Bul 12. Salk 14. The 3^d person is a wrongdoer abusing y Process of Law, to y (now) Pltffs injury.

2^d Where y Pltff in y original suit having good cause of action sues in a Ct, not having cognizance, y action lies. But it is necessary

yt y def. (y original Pltf) 2 Miles 302. Esp 2026
 Aliter no Malice. & shd know.

But if y wrong consists in arresting y Def.
 in y first action is not his remedy, an action
 of Treble for false Imprisonment, the process being void?
 see ante 11.12.13. § 15. It is y distinction yt action
 for malicious prosecution may be brot, if malice
 can be proved, and Treble as to it can or
 not.?

3^d If a Person having ^{no} right of action nor
 colour of right and knowing it to be so, sues
 another for y purpose of vexation, he is liable.
 2 Miles 305. 1 Bet P. 388. 2 ibid 129.³ Cas 314.
 No such cases in the old Books.

And y action lies not in such cases unless Def.
 in it is held to Bail. 2 Phil Ev 116. n Peter R 207.

If he is not held to Bail, y costs he recovers
 are considered a satis compensation. There is this
 agreeable to Principles? vide Infra.

4th So if for such purpose, he sues and holds
 to Bail for a much greater sum ym is due.
 1 Taun 228. Esp 520. 6. 1 Tide 424. Bull 12

But y action will not lie in this case,
 in y Pltf has been arrested, and holden to excessive
 Bail. Esp 526. Bul 12. There is no damage
 accruing from that cause and, the Original Pltf
 had a right to sue, for his demand.
 Holding to reasonable bail is no Injury.

When y Malicious proceeding complained off
is Final Process. It is utterly groundless & known
to be so. by the Original Pltf, tho no arrest of
y Person. but merely property taken, action
clearly lies. Ek 327. As Def sued out a second
Fi. Fa. and sold Pltf goods, under it after
having taken other goods, under former Fi. Fa.
action lay for vexation and damage, 1 Col 205.
Bul 12. 1 Col 2 266. Quod Lege. Here y proceeding
supposed being Final Process, no Cost cd be
recovered upon it by the Party injured.

The Particular gravamen or injury must in
general be stated when founded on former
civil prosecution. That it was maliciously and
with intent to injure and oppress y Pltf.
2 Wils 300. Ek 332. 1 Talk 14.15 1 Sid 424.
Id Ray 380. Bull 12

Do on purpose to hold y Pltf to Bail, "if
ye is y Injury." Talk 10. Bul 12. No damage
being presumed. ante 1. Silence

In all actions in general where y original
prosecution is Civil, it is necessary that
Special damage be laid and proved.
1 Talk 14.15. Id Ray 374.

Secus if a Stranger incites A to bring a groundless
suit vs B. No Special damage is necessary
as vs him - not a claim of Right by him.
He ant amercable. Talk 14. Id Ray 38. or 380.
nor liable to Cost.

Two requisites are necessary in all cases to support this action for a Civil Suit.

I Former action determined & ended, for it can't otherwise appear to have been groundless or unjust. Doug 205. Talk 15.

II. Damages (i.e. actual) already accrued, and inevitable. Ek 527. 31. Str 614. Bull 13.

Therefore if one forge a Bond in my name, I can have no action till sued upon it. So of Pltff in a Judgment after having obtained satisfaction on a Sc Fa. wrongfully obtain another ~~Case~~ but has not proceeded with it.

But not necessary that the vexatious suit shd have been decided in favour of y present Pltff. As nonsuit suffered in the original action, yet this lies. Ek 527. Bull 13.

Any groundless proceeding by action when ended, is on this point sufficient. Ek 527.

Our St gives an action to all, who willingly wrong others by prosecuting any Suit &c with intent to trouble and vex. & treble damages. St Count 429.

It also subjects to a Fine of 7. Dole. & for 3^d offences, to be proceeded to as a Common Bawler. St Count 429.

Two can't join in an action for a vexatious
suit, y injuries being separate and Personal.
Libby 145.

There might not 2 Merchants who had been
sued in a groundless and Malicious action to
their Pt Injury in their trade? See Slander.

But there may be 2 defs, Bul 5. 1 Str 70.
2 ibid 909 910. E/b 537. It is a positive Tort.
implying an act in wh 2 may join.

Whether damages may be ^{several} ~~several~~ recovered in this
action vs Several. Two be contradictory.
How can they be several. The wrong is
Indivisible. Each guilty of y whole.
vade assault and Battery. E/b 537. 1 Str 79.
2 ibid 910.

Not Averable by our practice.

Malice is a most Material Ingredient in
y damages recoverable in this action. 4 Burr
1971. E/b 527.

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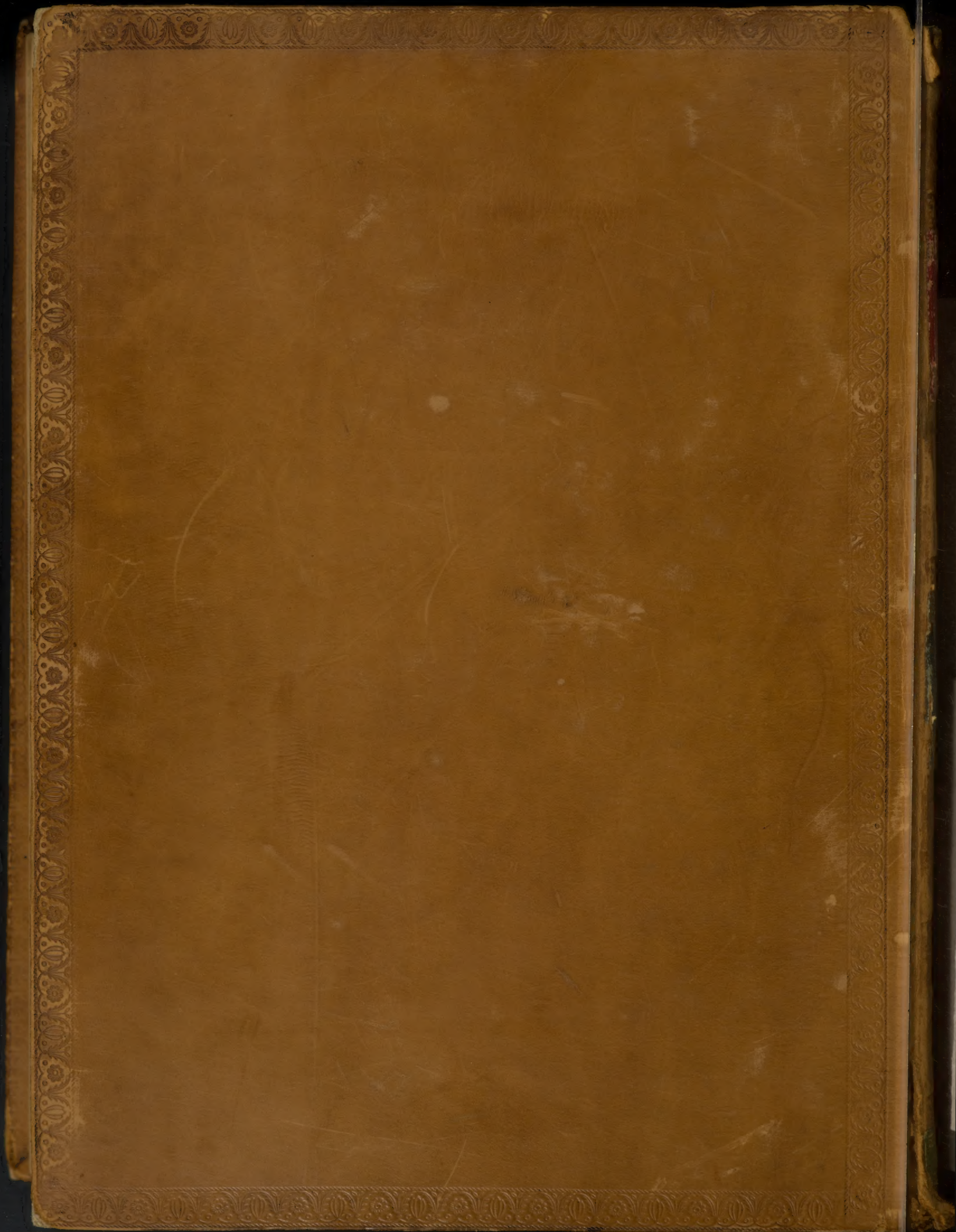
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